Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

ANCHOR HOCKING, INC.,

Petitioner,

v.

ARLEEN E. WADDILL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE OREGON COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Before *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994) ("*Oberg* (*federal*)"), the amount of a punitive damages award made by a jury was unreviewable in Oregon, under Oregon's culture of complete deference to juries' factfinding. In response to *Oberg* (*federal*), the Oregon Supreme Court adopted a "rational juror" standard of review that remained highly deferential (*Oberg v. Honda Motor Co.*, 320 Or. 544, 551, 888 P.2d 8, 12 (1995), *cert. denied*, 517 U.S. 1219 (1996) ("*Oberg* (*state*)")), and the Oregon Supreme Court has reaffirmed that standard even after *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) and *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). *See Parrott v. Carr Chevrolet, Inc.*, 331 Or. 537, 17 P.3d 473 (2001). Is Oregon's deferential standard (which was applied in this case) consistent with the due process mandate articulated in *BMW* and *Cooper*, which requires independent judicial examination of punitive damages awards, under three criteria, without deference to the jury?

2. Was the $1 million punitive award in this case excessive

(a) under *BMW* and *Cooper*?

(b) because the admitted measure of damages — one month of the defendant's nationwide profits from all of its products — includes extraterritorial punishment?

(c) under the Excessive Fines Clause (when the State shares in punitive awards)?

3. Should the Court defer consideration of this Petition pending the disposition of *State Farm Mut. Auto Ins. Co. v. Campbell*, No. 01-1289 (certiorari granted June 3, 2002), which raises similar issues concerning the standards for reviewing punitive damages awards and extraterritorial punishment?

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIP

Petitioner Anchor Hocking, Inc. is an indirect, wholly-owned subsidiary of Newell Rubbermaid Inc. Newell Rubbermaid Inc. is publicly traded.

Respondent Arleen E. Waddill is an individual.

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Petitioner Anchor Hocking, Inc. ("Anchor Hocking") respectfully petitions for a writ of certiorari to review the judgment of the Oregon Court of Appeals in this case.

OPINIONS BELOW

The opinions of the trial court, the Circuit Court of Multnomah County, Oregon (19a-21a), have not been officially reported. The opinion of the Oregon Court of Appeals (1a-18a) is reported at 175 Or. App. 294, 27 P.3d 1092 (2001). The opinion of the Oregon Supreme Court, denying Anchor Hocking's petition for review (22a), has not been officially reported, but its action denying review is noted at 334 Or. 260, 47 P.3d 486 (2002).

STATEMENT OF JURISDICTION

The judgment of the Oregon Court of Appeals was entered on July 11, 2001. Anchor Hocking timely filed a petition for discretionary review with the Oregon Supreme Court on October 10, 2001. The Oregon Supreme Court denied the petition for review on June 4, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1.

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

STATEMENT OF THE CASE

This case raises the question whether a state may constitutionally impose, without any meaningful judicial review, a million-dollar punitive damages penalty because a manufacturer failed to warn that a glass fishbowl — conceded to be flawlessly designed and manufactured — might break.

Petitioner Anchor Hocking manufactures glass products, including fishbowls. The plaintiff owned a two-gallon Anchor Hocking fishbowl, which broke while she was handling it. The broken glass cut her hand. She sued Anchor Hocking on a failure-to-warn theory, expressly dropping any claim of defect in design or manufacture.

The plaintiff's compensatory liability theory was that, no matter how well designed and manufactured, every fishbowl could, when used as intended, develop "imperceptible" cracks that were "too small to see," which could cause it to break without warning, like a "time bomb." The manufacturer should have warned, the plaintiff claimed, that fishbowls should not be used if bumped, chipped, or scratched (though she denied this happened to hers), and should be examined carefully (though the alleged problem was "imperceptible" — indeed, only an expert with special training and equipment could find it). In essence, she claimed that Anchor Hocking failed to warn her (1) to avoid doing what she said she never did, and (2) to be on the lookout for what she could not see.

The plaintiff's punitive damages theory was that Anchor Hocking failed to preserve written records of three prior complaints about broken fishbowls, which assertedly should have alerted it to the need to give the proposed warning. In response to a discovery request for documents concerning such prior claims, Anchor Hocking had initially found no responsive documents in its files, but later amended its disclosure and produced records of a ten-year-old lawsuit (*Fischer*), which referenced two earlier complaints (*Gifford* and *Bye*), which the plaintiff then obtained.

All three prior complaints involved fishbowls that allegedly broke because of isolated manufacturing defects, of a kind expressly disclaimed here. Even these allegations were never proved. The fifteen-year-old *Bye* case was dismissed by stipulation, making Anchor Hocking the prevailing party under Oregon law. Anchor Hocking won the ten-year-old *Gifford* case in Tennessee, which was dismissed on Anchor Hocking's motion and with the plaintiff's acquiescence, after years of repeated continuances and failures to proceed by the plaintiff. Anchor Hocking settled the *Fischer* case, without admitting liability, in the face of numerous disputed issues, ranging from whether Anchor Hocking manufactured the bowl (Fischer threw the broken bowl away) to how the bowl broke (because it had been discarded, it was never tested, but contemporaneous hospital records state that Fischer "dropped [the] fishbowl").

At trial, the plaintiff offered the complaints and answers in the *Fischer*, *Gifford*, and *Bye* cases on the liability issue, arguing that these old claims of defective manufacture should have made Anchor Hocking aware of a need to warn the plaintiff about a different alleged danger posed by properly manufactured bowls. The trial court admitted this evidence,

over Anchor Hocking's objection, for "notice," but (again over objection) the plaintiff instead suggested their supposed merit throughout trial.

The plaintiff also used the prior complaints as the basis for her punitive damages claim. She argued that, because Anchor Hocking's engineering manager had a practice of preserving records of product complaints only for five years, Anchor Hocking deliberately and "consciously blinded itself" to a "known serious risk" by "destroy[ing] the records that demonstrated" past misdeeds. The supposed "known" merit of the prior lawsuits, coupled with Anchor Hocking's supposed "conscious destruction" of their records, were claimed to be so egregious as to call for punitive damages.

The jury, voting 9-3, returned a general verdict for the plaintiff in July 1995. The jury assessed compensatory damages of $134,472, and punitive damages of $1 million.[1] The jury also found the plaintiff 25% at fault. The trial court entered judgment, reducing the compensatory, but not the punitive, award by 25%.

After unsuccessfully seeking post-trial relief (19a-21a), Anchor Hocking appealed, raising a number of state-law challenges regarding liability and punitive damages, as well as several federal constitutional challenges (including whether the punitive damages award was excessive under the Due Process and Excessive Fines Clauses and whether it improperly included extraterritorial punishment). In the Oregon Court of Appeals, Anchor Hocking invoked the punitive damages analysis required by this Court's then-recently-issued decision in *BMW*.

1. Today, the punitive damages award, including interest since the award was rendered in 1995, is in excess of $1.6 million.

The Oregon Court of Appeals initially reversed and ordered a new trial, without reaching the punitive damages issues. *Waddill v. Anchor Hocking, Inc.*, 149 Or. App. 464, 479, 944 P.2d 957, 966 (1997). The Oregon Supreme Court reversed the new trial order, and subsequently (on Anchor Hocking's motion for reconsideration) remanded for consideration of the remaining issues, including those concerning punitive damages. *Waddill v. Anchor Hocking, Inc.*, 330 Or. 376, 8 P.3d 200 (2000); *Waddill v. Anchor Hocking, Inc.*, 331 Or. 595, 595, 18 P.3d 1096, 1097 (2001).

After the Oregon Supreme Court granted Anchor Hocking's petition for reconsideration, but before the Court of Appeals issued its opinion on remand, this Court decided *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). Anchor Hocking sought leave to file a supplemental brief on remand to address *Cooper*, *inter alia*, but the Oregon Court of Appeals refused. *Waddill v. Anchor Hocking, Inc.*, 175 Or. App. 294, 302 n.5, 27 P.3d 1092, 1097 n.5 (2001) (11a).

On remand, the Oregon Court of Appeals affirmed the verdict in its entirety without reaching many of Anchor Hocking's federal constitutional challenges. Anchor Hocking's challenges to the million-dollar punitive award included an Excessive Fines Clause analysis and an analysis under the three guideposts of *BMW*, 517 U.S. at 574-75.[2] On the first *BMW* guidepost (reprehensibility), Anchor Hocking pointed to the absence of any evidence that it "consciously ignored" that its fishbowls had the problem

2. As the Oregon Court of Appeals noted, Anchor Hocking had preserved these challenges to the amount of the punitive award in its post-trial motion, as required by Oregon law. *Waddill*, 175 Or. App. at 305 n.7, 27 P.3d at 1098 n.7 (15a).

complained of (for the three prior complaints concerned a different alleged problem, and in any event were mere unproved complaints), and the absence of any evidence that it "concealed" records of its "guilt." On the second *BMW* guidepost (proportionality), Anchor Hocking argued that the 10:1 ratio of punitives:compensatories was excessive, especially in light of the substantial compensatory award and the low (if any) reprehensibility of its conduct. On the third *BMW* guidepost (comparable penalties), Anchor Hocking argued that no civil or criminal penalty came close to $1 million, and it was never on notice that its conduct could subject it to such an award. In addition, Anchor Hocking argued that the punitive award — calculated as one month's profits for the entire company (of which fishbowl manufacture was a tiny part), and based on its conduct throughout the United States (including specifically Tennessee, where it *won* the *Gifford* case) — improperly imposed extraterritorial punishment.

The Court of Appeals ignored *Cooper*'s statement that the amount of punitive damages awarded by the jury was not a "fact" entitled to any deference. It did not address Anchor Hocking's Excessive Fines argument, failed to address extraterritoriality, and failed even to consider *BMW*'s comparative-fines guidepost. *Waddill*, 175 Or. at 301-07, 27 P.3d at 1096-99 (9a-17a). The Oregon Supreme Court denied review. 334 Or. 260, 47 P.3d 486 (2002) (22a).

REASONS FOR GRANTING THE WRIT

The Oregon courts have defied this Court's repeated, express directives that due process requires independent judicial scrutiny of punitive damages awards for excessiveness. The Oregon Supreme Court's decisions in

Oberg (*state*), 320 Or. at 551, 888 P.2d at 12, and *Parrott*, 331 Or. at 554-55, 17 P.3d at 484, which forbid independent judicial scrutiny, conflict with this Court's decisions in *BMW*, 517 U.S. at 574-75, and *Cooper*, 532 U.S. at 436, 440-43, which mandate it. The Oregon Court of Appeals followed *Oberg* (*state*) and *Parrott*, rather than *BMW* and *Cooper*, and the Oregon Supreme Court denied review.

Oregon has a longstanding jurisprudential culture of complete deference to juries' factfinding. That culture, embraced in Oregon as a matter of state constitutional principle, came before this Court in *Oberg* (*federal*), 512 U.S. at 427-29, when the Court held that federal due process took precedence over any application of this state constitutional principle insulating juries' punitive assessments from judicial review (*id.* at 430-34). The Court required that Oregon courts (which had refused to review the amount of juries' punitive awards at all) provide such review, but it did not then particularize the standard of review. *Id.* at 432 & n.10. In response, the Oregon Supreme Court adopted a standard of review, which it called the "rational juror" standard, that provides review in form but not in substance, for such review continues to require complete deference to the jury unless the verdict was completely irrational. *Oberg* (*state*), 320 Or. at 551, 888 P.2d at 12.

The Oregon courts have continued to insist on this deference even after this Court particularized the due-process-required standard of review in *BMW* and *Cooper*. In those cases, the Court made clear that punitive damage determinations are not "facts" to which a state may demand complete deference, but instead are determinations

that require judicial judgments (e.g., cross-case comparisons to ensure consistency and compatibility with comparable civil or criminal penalties).

In response to *BMW*, the lower Oregon courts began to provide such review.[3] But the Oregon Supreme Court put an end to that practice, holding in *Parrott* that the Oregon Constitution and the "rational juror" standard continue to demand total deference to juries, so long as the jury was not irrational:

> [W]e conclude that the guideposts announced in *BMW* are *additional factors* for the reviewing court in Oregon to consider as part of the *Oberg* (*state*) rational juror review. . . . [T]he rational juror inquiry survives as the standard for post-verdict judicial review of an award of punitive damages in Oregon under the Fourteenth Amendment.

331 Or. at 554-55, 17 P.3d at 484 (emphasis added).

In *Cooper*, which was issued a few months after *Parrott*, this Court stated that "the question of the substantive standard for determining the jury award's conformity with due process in the first instance . . . [was] answered in *BMW of North America, Inc. v. Gore*." *Cooper*, 532 U.S. at 431 n.4 (internal

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3. *See, e.g.*, *Blume v. Fred Meyer, Inc.*, 155 Or. App. 102, 113, 963 P.2d 700, 706 (1998) (after *BMW*, the *Oberg* (*state*) rational juror standard was no longer applicable); *Parrott v. Carr Chevrolet*, 156 Or. App. 257, 274-75, 282, 965 P.2d 440, 451, 455 (1998) (following *Blume*, Court of Appeals ordered remittitur of $1 million punitive award to $300,000), *rev'd in relevant part*, 331 Or. 537, 565, 17 P.3d 473, 490 (2001).

citations omitted). It further held that "[u]nlike the measure of actual damages suffered, which represents a question of historical or predictive fact, the level of punitive damages is not really a 'fact' 'tried' by the jury." *Id.* at 437 (internal quotations and citations omitted). Nonetheless, the Oregon Court of Appeals treated the $1 million punitive damages award in this case as a fact found by the jury and applied the kind of total deference to the jury's verdict mandated by *Oberg* (*state*) and *Parrott*.[4]

What the Oregon courts characterize as deference is in reality judicial abdication of a profound constitutional duty. This is not the first time the Oregon courts have defied this Court's plain statements concerning punitive damages. In *Oberg* (*federal*), the Court noted that the Oregon Supreme Court had "reject[ed] the idea that judicial review of the size of punitive damages awards was required by [*Pacific Mut. Life Ins. Co. v. Haslip*, 449 U.S. 1 (1991)]," even though "[o]ur recent cases have recognized that the Constitution imposes a substantive limit on the size of punitive damages awards" (512 U.S. at 428, *citing Haslip* and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993)). In *Parrott*, the Oregon Supreme Court reiterated that "[t]here is . . . no 'state law excessiveness challenge' under the Oregon Constitution" and stated that it had articulated a standard for reviewing punitive damages under the "*federal constitution*" only because this Court had required it. *Parrott*, 331 Or. at 551, 553, 17 P.3d at 482, 483 (emphasis in original).

Parrott and *Cooper* have collided in this case. The "rational juror" standard is simply incompatible with the requirements of the federal Due Process Clause, as

4. *Parrott* was settled before the filing of a petition for a writ of certiorari.

articulated by this Court. The Court of Appeals refused to take additional briefs in light of *Cooper* and plainly misapprehended the significance of the decision, characterizing it as relating only to procedure and not to substantive due process. *Waddill*, 175 Or. App. at 302 n.5, 27 P.3d at 1097 n.5 (11a). As a result, the court, relying only on *Parrott*, improperly deferred to the jury and failed to apply independent, de novo judicial scrutiny.[5]

This Court has signaled the constitutional significance of *Cooper*, promptly vacating three state-court decisions for reconsideration in light of *Cooper*. *See San Paolo U.S. Holding Co. v. Simon*, 532 U.S. 1050, 1050 (2001) (vacating unpublished opinion from the California Second Appellate District, and remanding for further consideration in light of *Cooper*); *Time Warner Entertainment Co. v. Six Flags Over Georgia*, 122 S. Ct. 24, 25 (2001) (vacating 245 Ga. App. 334, 537 S.E.2d 397, and remanding for further consideration in light of *Cooper*); *National Union Fire Ins. Co. v. Textron Financial Corp.*, 122 S. Ct. 340, 340 (2001) (vacating unpublished opinion from the California Fourth Appellate District, and remanding for further consideration in light of *Cooper*).[6]

The "rational juror" standard, coupled with Oregon's long-standing hostility to subjecting the size of jury verdicts

5. Indeed, the court did not faithfully apply *Parrott* itself, for the punitive damages award is plainly excessive even under the "rational juror" standard.

6. *See also* 69 U.S.L.W. 3675, 70 U.S.L.W. 3031, and 70 U.S.L.W. 3156, listing the questions presented in the certiorari petitions in *San Paolo*, *Time Warner*, and *National Union*, respectively.

to any scrutiny, amounts in practice to no review at all. *Oberg* (*federal*), *BMW*, and *Cooper* have had a profound impact on the judicial review of punitive damages throughout the United States — but not in Oregon. Some of the lower Oregon courts have shown willingness to review punitive damages awards under *BMW*, but they have been forbidden by the Oregon Supreme Court. Only this Court has the power to correct this situation and restore meaningful punitive damages review in Oregon.

It is clear for multiple reasons that the amount of punitive damages awarded in this case cannot survive meaningful judicial scrutiny. First, under *BMW* and *Cooper*, Anchor Hocking's conduct was not reprehensible. At best, the evidence showed that Anchor Hocking was negligent in multiple, independent ways. The ratio of punitive damages to compensatory damages is nearly 10:1, suspiciously excessive since the case involves a cut hand for which the plaintiff received significant compensatory damages and reprehensibility is absent. Finally, the comparable civil or criminal penalties for Anchor Hocking's conduct were orders of magnitude less than the $1 million award. Anchor Hocking had no notice that negligent failure to warn and failure to keep records would subject it to so large an award.

Second, the award unquestionably includes extraterritorial punishment, contrary to *BMW*. The plaintiff relied on the *Gifford* case from Tennessee in arguing for punitive damages, even though Anchor Hocking won that case. Moreover, the plaintiff's benchmark for punitive damages was one month of Anchor Hocking's nationwide profits from all products, not just fishbowls like that at issue in this case.

Third, the $1 million award cannot survive scrutiny under the Excessive Fines Clause. The Oregon Supreme Court recently confirmed that Oregon's split-share statute, under which the State of Oregon receives a significant percentage of any punitive damages award, does not violate the Oregon Constitution. *See DeMendoza v. Huffman*, 334 Or. 425, 2002 WL 1827841, at *17 (Or. Aug. 8, 2002). Accordingly, if the punitive damages award is upheld, Anchor Hocking will be required to pay the State one-half of the award after deducting the plaintiff's attorneys' fees.[7] The resulting public fine — hundreds of thousands of dollars — is completely out of proportion to the gravity of Anchor Hocking's alleged offense (negligently failing to keep records of prior lawsuits alleging defectively manufactured bowls, which assertedly would have led Anchor Hocking to warn about perfectly manufactured bowls). *See United States v. Bajakajian*, 524 U.S. 321, 334 (1998) (a fine is constitutionally excessive "if it is grossly disproportional to the gravity of a defendant's offense").

The standards for reviewing punitive damages awards and the propriety of extraterritorial punishment are currently before the Court in *State Farm Mut. Auto Ins. Co. v. Campbell*, No. 01-1289 (certiorari granted June 3, 2002). The Court's decision in *Campbell* will likely have a further profound impact on judicial review of the amount of punitive damages. Accordingly, Anchor Hocking respectfully requests that the Court, at a minimum, defer consideration of this Petition pending the disposition of *Campbell*.

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7. Under the version of Oregon Revised Statutes 18.540 applicable to this case, the State receives one-half of the remainder of any punitive damages award after a deduction for attorneys' fees. The version of ORS 18.540 at issue in *DeMendoza* provided for a 60% flat allocation to the State. 2002 WL 1827841, at *2.

I. Review is Warranted to Determine Whether Oregon's Standard for Reviewing Punitive Damages Awards is Consistent with this Court's Decisions.

The Court should grant review to determine whether the "rational juror" standard of *Oberg* and *Parrott* can survive *BMW* and *Cooper* (and to hold that it cannot). As a matter of federal constitutional law, the amount of punitive damages that the jury awarded was not a "fact" entitled to any deference. *Cooper*, 532 U.S. at 437. The Due Process Clause requires a reviewing court independently to examine punitive damages awards under the three-factor *BMW* test, without giving deference to the jury. *Id.* at 440. In affirming the punitive award, the Court of Appeals applied a deferential "rational juror" standard based on *Oberg* and *Parrott*, and failed to conduct de novo review, required by *Cooper* under the standards articulated by *BMW*.

The "rational juror" standard is starkly incompatible with all of the *BMW* guideposts and the de novo review mandated by *Cooper*. "Independent examination or review means a searching review, one that hunts for error and gives virtually no weight to the decisional process under review." *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 272 F.3d 1335, 1347 (Fed. Cir. 2001), *cert. pending*, No. 02-130.

With respect to the first *BMW* guidepost (reprehensibility), the jury is instructed to consider "the character of the defendant's conduct," but it is given no guidance as to what that means. "Reprehensibility depends on the nature of the conduct itself and the context in which it occurred. Reprehensibility does not ask whether [a defendant's] conduct warrants punishment. . . . Instead, the first *BMW* factor is concerned with where [a defendant's]

conduct fits on a scale of outrageousness." *Watson v. Johnson Mobile Homes*, 284 F.3d 568, 572 (5th Cir. 2002). Along this scale, "[c]onduct involving violence or threats of violence is obviously more shocking than that which causes only economic harm. Similarly, trickery and deceit are more deserving of sanction than mere negligence." *Id.* (internal citations omitted), *citing BMW*, 517 U.S. at 575-76. Ascertaining a reprehensibility spectrum that is coherent, rational, and consistent across cases is a function that only courts can carry out effectively.

Indeed, while reviewing courts must defer to juries' determination of underlying facts unless clearly erroneous, "determining the 'degree of reprehensibility' ultimately involves a legal conclusion." *Leatherman Tool Group, Inc. v. Cooper Indus., Inc.*, 285 F.3d 1146, 1150 (9th Cir. 2002). As three members of this Court observed in *BMW*, jurors cannot be expected "to interpret law like judges, who work within a discipline and hierarchical organization that normally promotes roughly uniform interpretation and application of the law." 517 U.S. at 596 (Breyer, J., concurring, joined by O'Connor and Souter, JJ.).

The second due process guidepost (the disparity between the punitive damages award and the actual or potential harm inflicted) includes a factual component — the jury's assessment of the plaintiff's actual damages — but it, too, involves a predominantly legal inquiry. The question asked by the court is not simply "what is the ratio?" Rather, it is whether the disparity between the punitive damages and the compensatory award (or the plaintiff's potential harm) is so dramatic as to be outside the "constitutionally [or legally] acceptable range." The only nonarbitrary way to determine whether a particular ratio is excessive for the particular set

of variables present in a given case is to consider ratios that have been permitted in other cases. Juries cannot and do not perform that inherently legal function. Only judges can.

The third *BMW* guidepost requires the reviewing court to consider whether the jury's award is "substantially greater" than statutory penalties for comparable conduct. 517 U.S. at 584. For this component of due process analysis, the court must undertake traditional legal research, seeking to identify potentially applicable statutes and penalties. Then it must once again make a judgment whether the disparity between those penalties and the jury award is so substantial as to indicate that the verdict is profoundly out of line with legislative judgments[8] about the appropriate punishment for such conduct, denying the defendant fair notice that it was risking sanctions of the magnitude issued by the jury. As this Court noted in *Cooper*, the comparison with statutory penalties is "more suited" to appellate review because it calls for "a broad legal comparison." 532 U.S. at 440.

In short, the constitutional challenges to punitive damages awards for excessiveness must undergo independent, de novo judicial review, without deference to what a "rational juror" may have done, if the Due Process Clause is to function effectively as a bulwark against wholly arbitrary or irrational awards. Indeed, the only refuge from

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8. Notably, the Oregon Supreme Court's "rational juror" standard accords deference to the wrong deliberative body. Explaining the rationale behind the third guidepost, this Court in *BMW* stated that courts must "accord 'substantial deference' to *legislative* judgments concerning appropriate sanctions for the conduct at issue." 571 U.S. at 583 (citation and quotation omitted; emphasis added). By contrast, the rational juror standard requires substantial deference to the opinion of the jury.

such verdicts is the imposition of "significant[] constrain[ts]" on the determination whether the jury's award has transcended constitutional bounds. *BMW*, 517 U.S. at 595 (Breyer, J., concurring). Under a deferential "rational juror" standard, the guideposts adopted in *BMW* that "purport to channel discretion" will "not do so in fact." *Id.* Rather, the deference will invite, if not encourage, judicial nullification of these supposedly constraining forces. In the end, the highly deferential "rational juror" standard is virtually identical to the "rational basis scrutiny" proposed by the respondents and rejected by this Court in *TXO*, 509 U.S. at 455-56.

In *Cooper*, the Court made clear that "the question of the substantive standard for determining the jury award's conformity with due process in the first instance" was no longer an open issue, for the question "has already been answered by [*BMW*]." 532 U.S. at 431 n.4. *Cooper* went further, however, holding that this substantive standard must be weighed and applied by the court de novo. *Id.* at 435-40. The Court signaled the importance of *Cooper* when it granted certiorari, vacated, and remanded three state-court cases for reconsideration in light of that decision. *See San Paolo*, 532 U.S. at 1050; *Time Warner*, 122 S. Ct. at 25; *National Union Fire Ins.*, 122 S. Ct. at 340. The petition for writ of certiorari in each case contended that the lower court applied a deferential standard of review.[9]

The Court's attention to whether states are faithfully following *Cooper* underscores why review is appropriate here: the lower courts of Oregon cannot follow both *Cooper*

9. *See also* 69 U.S.L.W. 3675, 70 U.S.L.W. 3031, and 70 U.S.L.W. 3156, listing the questions presented in the certiorari petitions in *San Paolo*, *Time Warner*, and *National Union*, respectively.

and the Oregon Supreme Court's decisions. The Oregon Supreme Court has declined either to provide guidance or to implement federal constitutional requirements. Particularly in light of the Oregon courts' repeated defiance of this Court's directives concerning review of punitive damages awards, review is warranted. *See* Rule 10(c).

II. The Court Should Review the Punitive Damages Award for Excessiveness.

A. The Award is Excessive under *BMW* and *Cooper*.

The Oregon Court of Appeals plainly misapplied *BMW* and *Cooper*. In *BMW*, 517 U.S. at 574-75, this Court held that due process requires a court to consider the degree of reprehensibility of the conduct, the disparity between the harm and the punitive award, and the difference between the punitive award and comparable civil or criminal penalties.[10] In *Cooper*, 532 U.S. at 435-40, the Court held that due process requires a reviewing court to consider these criteria independently of the jury, "de novo." As Anchor Hocking explained in its briefs to the Oregon Court of Appeals, the plaintiff demonstrated neither that Anchor Hocking's conduct was reprehensible, nor that the award was proportional to the harm she suffered, nor that the award was proportional to penalties authorized for comparable conduct. The Oregon Court of Appeals not only erred in applying the *BMW* criteria, but failed to analyze these criteria de novo in accordance with *Cooper*.

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10. The Court of Appeals held that Anchor Hocking "followed the appropriate post-trial procedures for raising [the excessiveness] issue." *Waddill*, 175 Or. App. at 305 n.7, 27 P.3d at 1098 n.7 (15a).

1. Reprehensibility.

The Oregon Court of Appeals improperly held that Anchor Hocking's conduct was reprehensible. The court based its conclusion of reprehensibility solely on the ground that Anchor Hocking assertedly "consciously ignore[d] indications that its product was unsafe." *Waddill*, 175 Or. App. at 306, 27 P.3d at 1099 (17a). As discussed above, however, there was no evidence that Anchor Hocking consciously ignored anything. It contested the prior lawsuits, winning one and securing settlement or dismissal of the others. Even were the Court to conclude that those lawsuits (admitted only for "notice") actually proved a prior problem with Anchor Hocking's fishbowls, the prior problem (manufacturing defect) was one the present plaintiff expressly disclaimed. Nowhere in the Oregon Court of Appeals' opinion is there an explanation of how a complaint alleging that an isolated fishbowl was defectively manufactured can provide notice to a defendant that its perfectly manufactured products contain a different defect about which it must warn. This would be like saying that a drug manufacturer, knowing that on some past occasions its pills were contaminated and made people sick, should know to warn that the uncontaminated drug itself makes people sick.

2. Proportionality.

The Oregon Court of Appeals also failed properly to analyze the award under the second *BMW* factor. Rather than compare the punitive and compensatory awards to determine "the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award" (*Cooper*, 532 U.S. at 440), the Oregon Court of Appeals simply stated that it could not conclude that a 10:1 ratio was "excessively

disproportionate" given that "broken glass is dangerous." *Waddill*, 175 Or. App. at 306, 27 P.3d at 1099 (16a). Indeed, the court ignored this Court's guidance that a 4:1 ratio "might be close to the line" (*BMW*, 517 U.S. at 581 (internal quotation omitted)), though "*low* awards of compensatory damages may properly support a higher ratio than *high* compensatory awards" (*id.* at 582 (emphasis added)). While the Oregon courts eschew any comparison of comparable awards, the punitive award both here and in *Parrott* was $1 million. The compensatory award in *Parrott*, however, was small — less than $12,000 — and the defendant's conduct was "more reprehensible" than Anchor Hocking's conduct here, factors that could support a higher ratio. *Waddill*, 175 Or. App. at 306 n.8, 27 P.3d at 1099 n.8 (17a). In contrast, the Oregon Court of Appeals admitted that the present plaintiff's compensatory damages — more than $100,000 even after reduction for her 25% fault — were "substantial." *Id.* at 306, 27 P.3d at 1099 (16a).

3. Comparable Penalties.

Finally, the Oregon Court of Appeals failed even to apply the third *BMW* factor. Rather than comparing "the difference between the punitive damages awarded by the jury and the civil penalties *authorized or imposed in comparable cases*" (*Cooper*, 432 U.S. at 440 (emphasis added)), the court asked whether Anchor Hocking had previously been punished for failing to warn of a defect in perfectly manufactured fishbowls — concluding that the absence of any prior punishment (*Waddill*, 175 Or. App. at 306, 27 P.3d at 1099 (16a)) made a large punitive award acceptable. That was the wrong question, showing a stark misunderstanding of the purpose of the third *BMW* factor.

As this Court explained in *BMW*, penalties for comparable misconduct are relevant to whether a defendant was on notice of "the severity of the penalty" that might be imposed. *BMW*, 517 U.S. at 574. The Oregon Court of Appeals engaged in no such comparison. Its entire discussion of notice was that "ORS 30.925 puts manufacturers on notice that *such* punishment is a possibility" (*Waddill*, 175 Or. App. at 306, 27 P.3d at 1099 (16a) (emphasis added)), without elaborating what "such" means.[11] Indeed, the court nowhere explained how ORS 30.925 provided any notice to Anchor Hocking that its failure to possess complete records of 10- to 15-year-old complaints alleging a different defect, none of which was ever resolved against it, could subject it to a $1 million punitive award.[12]

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11. Indeed, the plaintiff's punitive plea centered on Anchor Hocking's supposed fault in keeping records of cases filed and resolved years before this lawsuit was filed or even contemplated. Nothing in Oregon law required Anchor Hocking to keep records of past, closed litigation. The closest Oregon law comes is forbidding the destruction of evidence with the intent of making it unavailable in a pending or imminent lawsuit (which did not happen here), a Class A misdemeanor. ORS 162.295. The penalty for a Class A misdemeanor by a corporation may not exceed $5,000. ORS 161.655(1)(b). Even if Anchor Hocking had discarded documents during the pendency of this case, rather than years before it arose, its maximum penalty would have been only 1/200th the $1,000,000 punitive award actually imposed here.

12. Nor did Anchor Hocking have any notice that it might incur such a penalty. In contrast to *Parrott*, where the Court held there was sufficient notice of a potential $1 million punitive award because, *inter alia*, "a regulatory scheme of sanctions that includes interruption or closure of business operations provides sufficient notice to a business defendant that its violation of the law could have serious economic consequences" (331 Or. at 564, 17 P.3d at 489), Anchor

(Cont'd)

4. "De Novo" Review.

To the extent the Court of Appeals considered the three *BMW* criteria at all, it did so with heavy deference to the jury's conclusions. *Cooper* forbids that approach, requiring that the court independently ("de novo") analyze the criteria, because as a matter of federal constitutional law they are matters of judicial, and not jury, competence. *Cooper*, 532 U.S. 437-40.

In adopting a standard of review that defers to the jury, the Oregon Supreme Court has never addressed the significance of the purpose of that review. The purpose is one of constitutional dimension, for the reviewing court's responsibility is to determine whether the standards of federal due process have been satisfied. This Court has held that "'the question whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case,'" *Cooper*, 532 U.S. at 435, *quoting Bajakajian*, 524 U.S. at 336-37 n.10, and in *Cooper* itself the Court concluded that whether a punitive damages award is constitutionally excessive calls for the application of a similar standard: "courts of appeals should apply a de novo standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards," *Cooper*, 532 U.S. at 436.

When a court reviews an award of punitive damages, it is not reviewing a jury's findings with respect to disputed

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(Cont'd)
Hocking had no notice that it might be subject to a $1 million punitive award for failing to possess complete records of old, unproved, closed complaints that concerned alleged manufacturing defects (concededly absent here).

historical events. (Was the light green? Who pulled the trigger? Was there a mouse in the soup?) "Unlike . . . question[s] of historical or predictive fact, . . . the level of punitive damages is not really a 'fact' tried by the jury." *Id.* at 437 (internal citations and quotations omitted). Punitive damages "operate as 'private fines' intended to punish the defendant and deter future wrongdoing." *Id.* at 432. Independent review, *without deference to the conclusions of the jurors*, is necessary as a prophylactic measure to guard against the danger of unconstitutional deprivations. This issue is nowhere addressed in *Parrott* or in the Oregon Court of Appeals' opinion below.

Anchor Hocking has not received the de novo review the federal Constitution requires. The Court should grant review to provide it.

B. The Award Includes Extraterritorial Punishment.

The Court should also grant review because the punitive damages award includes unconstitutional extraterritorial punishment. In *BMW*, this Court held that extraterritorial punishment violates the Due Process Clause, and required courts to consider whether punitive awards punish out-of-state conduct that was not illegal where it occurred. 517 U.S. at 571-73. The punitive award was improper because it was based, in substantial part, on Anchor Hocking's out-of-state conduct: a case in Tennessee that it won; hypothetical complaints throughout the country for which the plaintiff sought to punish Anchor Hocking precisely because she had no evidence that they even existed; Anchor Hocking's nationwide profits from the sale of products other than

fishbowls;[13] conduct in states where punitive damages are not allowed at all, *see BMW*, 517 U.S. at 613-14 & n.6 (Ginsburg, J., dissenting) (collecting authorities).

C. The Award is Excessive under the Excessive Fines Clause.

The Court also should grant review because the punitive damages award is excessive under the Excessive Fines Clause. The Excessive Fines Clause may apply when the government shares in a punitive damages award. *Browning-Ferris v. Kelco Disposal, Inc.*, 492 U.S. 257, 275-76 (1989); *id.* at 298-99 (O'Connor, J., concurring in part and dissenting in part) (clause would apply when the government either prosecutes an action or has a right to share in the proceeds); *Austin v. United States*, 509 U.S. 602, 607 (1993). Some federal courts have applied the Excessive Fines Clause when the state shares in a punitive award. *See, e.g., United States v. Advance Tool Co.*, 902 F. Supp. 1011, 1018-19 (W.D. Mo. 1995), *aff'd mem.*, 86 F.3d 1159 (8th Cir 1996), *cert. denied*, 520 U.S. 1120 (1997); *United States ex rel. Smith v. Gilbert Realty Co.*, 840 F. Supp. 71, 74-75 (E.D. Mich. 1993); *McBride v. General Motors Corp.*, 737 F. Supp. 1563, 1578 (M.D. Ga. 1990). *Contra, Tenold v. Weyerhaeuser Co.*, 127 Or. App. 511, 528-29, 873 P.2d 413, 423-24 (1994), *rev. dismissed*, 321 Or. 561, 901 P.2d 859 (1995); *Axen v. American Home Prods. Corp.*, 160 Or. App. 19, 23, 981 P.2d 340, 342, *rev. denied*, 329 Or. 357, 994 P.2d 124 (1999), *cert. denied*, 528 U.S. 1136 (2000).

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13. As the Court held in *Cooper*, it was improper to base a company's punishment on its entire sales volume, when not all of those sales were attributable to the wrongdoing. 543 U.S. at 442.

Whether the Excessive Fines Clause applies to punitive damages awards when the state expressly shares in the award is an issue of constitutional dimension that this Court has never considered. *See, e.g., Hoskins v. Business Men's Assur.*, 79 S.W.3d 901 (Mo. 2002) (recognizing that the issue remains open). The Oregon Court of Appeals did not consider the issue in this case, but its prior decisions in *Tenold* and *Axen* are in conflict with the decisions of federal courts that have, warranting review. *See* Rule 10(b).

A fine is constitutionally excessive "if it is grossly disproportional to the gravity of a defendant's offense." *Bajakajian*, 524 U.S. at 334. Under the Excessive Fines Clause, the $1 million punitive award is patently excessive. The Oregon Court of Appeals did not address Anchor Hocking's excessive fines argument.

III. Alternatively, the Court Should Hold the Petition Pending Disposition of *State Farm v. Campbell.*

The Court granted review in *State Farm Mut. Auto Ins. Co. v. Campbell*, No. 01-1289, on June 3, 2002 (the day before the Oregon Supreme Court denied review in this case). The issues presented in *Campbell* include questions concerning the standards for reviewing punitive damages awards and the constitutionality of punitive damages based on extraterritorial conduct. Because of the significant overlap between the issues presented in *Campbell* and those presented here, and the likelihood that the Court's decision in *Campbell* will be instructive, it would serve judicial economy to hold the present Petition pending resolution of *Campbell*.

CONCLUSION

The Petition for a Writ of Certiorari should be granted, or held pending the Court's disposition of *State Farm Mut. Auto Ins. Co. v. Campbell*, No. 01-1289.

Dated: September 3, 2002

Respectfully submitted,

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APPENDIX

APPENDIX A — DECISION OF THE OREGON COURT OF APPEALS DATED JULY 11, 2001

COURT OF APPEALS OF OREGON

9405-03390; A91012

July 11, 2001.

Arleen E. WADDILL,

Respondent,

v.

ANCHOR HOCKING, INC., a Delaware corporation,

Appellant.

Before EDMONDS, Presiding Judge, and DEITS, Chief Judge,* and ARMSTRONG, Judge.

EDMONDS, P.J.

This case concerns whether a manufacturer of fishbowls is liable to a consumer because of the failure of the manufacturer to warn that its fishbowls are subject to shattering after they acquire small cracks or dings during ordinary use. Plaintiff brought this action to recover for injuries that she suffered when a fishbowl that defendant manufactured shattered while she was carrying it. We originally reversed the judgment in favor of plaintiff and remanded the case for a new trial.

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* Deits, C.J., *vice* Warren, P.J., retired.

Appendix A

Waddill v. Anchor Hocking, Inc., 149 Or.App. 464, 944 P.2d 957 (1997). On review, the Supreme Court reversed our decision and remanded the case to us to decide several issues that we had not needed to consider in our first decision. *Waddill v. Anchor Hocking, Inc.*, 330 Or. 376, 8 P.3d 200 (2000), *on recons.* 331 Or. 595, 18 P.3d 1096 (2001). We now affirm the judgment.

According to plaintiff, the fishbowl that defendant manufactured shattered with no warning, and without touching or bumping into anything, after she had used it for several months. The jury could have found, based on the testimony of plaintiff's experts, that the fishbowl had developed a small crack or ding during normal use and that the stresses from being carried while filled with water suddenly caused the crack to grow catastrophically. Pieces from the shattering fishbowl severely and permanently injured plaintiff's arms and wrists. In her complaint, plaintiff alleged that defendant's failure to warn of the necessity of inspecting the fishbowl for small cracks or dings constituted negligence and made the fishbowl dangerously defective. She sought compensatory and punitive damages as a result of her injuries. The jury determined that plaintiff's actual damages totaled $134,472; it apportioned 75 percent of the fault for her injuries to defendant and 25 percent to plaintiff. The jury also awarded plaintiff punitive damages of $1,000,000. After reducing the compensatory damages to reflect the jury's determination of fault, the court entered judgment in plaintiff's favor for $1,100,854.

In our previous decision, we held that (1) the court did not err in admitting evidence of three previous cases in which

the plaintiffs had alleged that defendant's fishbowls had shattered in ways similar to what plaintiff alleged happened in this case; (2) plaintiff had properly stated claims for strict liability and negligence for defendant's failure to warn; but (3) plaintiff's additional allegation that defendant failed to keep proper records of the previous claims was not an independent basis for a claim. Because we could not tell whether the jury had based its verdict on the improper claim, we reversed and remanded for a new trial. *Waddill*, 149 Or.App. at 478-79, 944 P.2d 957. On review, the Supreme Court held that defendant had waived the defense of failure to state a claim by not raising it in a timely fashion. It originally reversed our decision and affirmed the trial court. *Waddill*, 330 Or. at 383-84, 8 P.3d 200. On reconsideration, the court modified its disposition and remanded the case to us to consider those assignments of error that we had not previously considered. *Waddill*, 331 Or. at 595, 18 P.3d 1096.[1]

In its petition for reconsideration to the Supreme Court, defendant described the issues that we had not decided as (1) whether the probative value of the evidence of the previous complaints was outweighed by the risk of undue prejudice; (2) whether a jury instruction on the failure to warn of a known risk correctly stated Oregon law; and (3) whether any award of punitive damages was proper and, if so, whether the amount awarded was excessive. We discuss those issues in that order.

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1. Because of the scope of the remand, we do not reexamine those previous rulings that the Supreme Court's decision did not affect.

Appendix A

To support its argument that the unfair prejudicial effect of the evidence of the previous complaints substantially outweighed their probative value, defendant relies primarily on the use that plaintiff allegedly made of the evidence after the trial court decided to admit it. According to defendant, the court admitted the evidence as relevant to demonstrate that defendant had notice of a problem with its fishbowls shattering before it manufactured plaintiff's fishbowl. However, defendant argues that plaintiff went beyond that ground for admission of the evidence and used the evidence for the substantive purpose of proving that the fishbowls in the previous cases broke for the same reason that the fishbowl broke in this case. The difficulty with defendant's argument is that it has nothing to do with whether the court's original decision to admit the evidence was correct. In making that decision, the court had to weigh the probative value of the evidence against its unfair prejudicial effect at the time that it ruled. That plaintiff may have subsequently used the evidence in ways that did not comply with the court's limitations on its admissibility has no bearing on whether the court erred in its original ruling. If plaintiff attempted to use the evidence for a purpose that went beyond the scope of the court's ruling, defendant could have moved that the court reconsider its decision, requested a limiting instruction, or objected to the purposes for which plaintiff sought to use the evidence. It did not do so, with one exception that we now discuss.

Defendant's product engineering manager testified that the fishbowl could not have shattered in the way that plaintiff described and that there must have been contact between the fishbowl and something else. On cross-examination, plaintiff asked:

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"Q. What about the other people that filed complaints, and they said they had, they hadn't bumped it? You heard Ms. Gifford testify by deposition and Mrs. Bocala testify that it had never been bumped and banged to their knowledge, and it just exploded. You heard that testimony, did you not, sir?

"A. Yes, along with the testimony of uneven glass.

"Q. You heard that testimony that it just exploded?

"A. Yes.

"[Defendant's attorney]: Your Honor, this evidence I thought was for — I'd object on relevance in terms it's the earlier complaints that were noticed.

"THE COURT: I didn't hear your last —

"[Defendant's attorney]: The earlier complaints were for notice, as I understood your ruling, were for notice.

"THE COURT: All right. The answer will stand.

"Next question, please.

"Q. (By [plaintiff's attorney]): Don't you think that information, if it was in the possession of Anchor

> Hocking, would have been adequate notice for Anchor Hocking to have to evaluate what had been occurring in these bowls? That that would be important information for them to know?"

Because plaintiff's question after the court's ruling refocused on the issue of notice, there is no basis for us to conclude that the trial court's ruling during trial caused any prejudice to defendant even if the use of the evidence before the objection exceeded the scope of the earlier ruling.

We conclude that the trial court did not err in ruling that the evidence of the prior instances of defendant's fishbowls shattering was substantially similar[2] to plaintiff's circumstances to make the evidence relevant for the limited purpose of demonstrating that defendant had notice of that propensity under ordinary use, notice that could require a prudent manufacturer to issue a warning to the consumers about the

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2. In its petition for reconsideration before the Supreme Court, defendant argued that we ignored the rule of *Conachan v. Williams*, 266 Or. 45, 60-61, 511 P.2d 392 (1973), that the court must undertake a "gate keeping" function by determining whether there is evidence of "substantial similarity" between the prior complaints and plaintiff's circumstances before permitting the introduction of the evidence of the prior complaints for any purpose, including notice to defendant of a problem that should have prompted a warning to consumers. In fact, we implicitly applied such a test and answered defendant's argument without an express reference to *Conachan*. After describing the evidence from the prior occurrences, we said that there was evidence in the pre-trial hearing from which a trier of fact could find that "plaintiff sustained physical injuries under almost identical circumstances to those circumstances that caused injuries to other complainants." 149 Or.App. at 469, 944 P.2d 957.

use of its product. OEC 401; OEC 402. *See also Oberg v. Honda Motor Company*, 316 Or. 263, 268-69, 851 P.2d 1084 (1993), *rev'd on other grounds sub nom Honda Motor Co. v. Oberg*, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994) (holding that evidence of reported problems with the defendant's product overturning backwards was admissible to prove that the defendant had notice of a dangerous defect in its product). We also conclude that the trial court did not abuse its discretion under OEC 403 at the pretrial hearing when it determined that the probative value of the evidence was not substantially outweighed by any unfair prejudice arising from the admission of the evidence. "Relevant evidence often has the effect of proving one party's position while harming the other's." *McCathern v. Toyota Motor Corporation*, 332 Or. 59, 71, 23 P.3d 320 (2001). Here, the potential prejudice that the evidence could also be viewed as proving that defendant manufactured fishbowls with a defective design (a theory not advanced by plaintiff) does not prevent the admissibility of the evidence for the limited purpose of demonstrating that defendant's notice of a problem that occurred during the ordinary use of its product should have prompted a warning on its part.

Defendant next asserts that the trial court's instruction on its duty to warn of a potential hazard was incorrect. According to defendant, the instruction misstated Oregon law because it in effect told the jury that defendant is liable for a failure to warn regardless of whether it knew or should have known that its fishbowls had a propensity to shatter with ordinary use. Defendant concedes that it failed to except to the instruction. ORCP 59 H provides:

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> "No statement of issues submitted to the jury pursuant to subsection C(2) of this rule and no instruction given to a jury shall be subject to review upon appeal unless its error, if any, was pointed out to the judge who gave it and unless a notation of an exception is made immediately after the court instructs the jury. Any point of exception shall be particularly stated and taken down by the reporter or delivered in writing to the judge. It shall be unnecessary to note an exception in court to any other ruling made. All adverse rulings, including failure to give a requested instruction or a requested statement of issues, except those contained in instructions and statements of issues given, shall import an exception in favor of the party against whom the ruling was made."

Nonetheless, defendant argues that the trial court's instruction was error on the face of the record. Accordingly, it asks us to review its assignment despite its failure to voice an exception to the instruction.

The substantive issue presented by defendant's argument is whether a statement in *Phillips v. Kimwood Machine Co.*, 269 Or. 485, 525 P.2d 1033 (1974), that the "knew or should have known" standard does not apply to strict liability failure to warn claims has been legislatively superseded by the subsequent enactment of ORS 30.920(3). That is the kind of issue that cannot be the subject of an unpreserved claim of error under the criteria that the Supreme Court described in *Ailes v. Portland Meadows, Inc.*, 312 Or. 376, 823 P.2d 956 (1991). One of those criteria is that the error must be obvious

and not reasonably in dispute. *Id.* at 381-82, 823 P.2d 956. Defendant's claim of error under this assignment does not satisfy that characterization.

Finally, we consider whether the evidence permitted the jury to award punitive damages and, if so, whether the evidence supports the amount that the jury awarded.[3] ORS 30.925 is the beginning point for determining the criteria for awarding punitive damages in a products liability case. The relevant portions of the 1979 version of the statute, which applies to plaintiff's claim,[4] provide:

> "(1) In a product liability civil action, punitive damages shall not be recoverable unless it is proven by clear and convincing evidence that the party against whom punitive damages is [*sic*] sought has shown wanton disregard for the health, safety and welfare of others.
>
> " * * * * * *
>
> "(3) Punitive damages, if any, shall be determined and awarded based upon the following criteria:

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3. Defendant does not assert that the court's instructions on punitive damages were incorrect.

4. The legislature amended ORS 30.925 in 1995. Or. Laws 1995, ch. 688, § 4. The amendments apply only to cases filed on or after September 9, 1995, the effective date of the changes. Or. Laws 1995, ch. 688, § 5. Plaintiff filed this case in 1994.

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"(a) The likelihood at the time that serious harm would arise from the defendant's misconduct;

"(b) The degree of the defendant's awareness of that likelihood;

"(c) The profitability of the defendant's misconduct;

"(d) The duration of the misconduct and any concealment of it;

"(e) The attitude and conduct of the defendant upon discovery of the misconduct;

"(f) The financial condition of the defendant; and

"(g) The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected."

Appendix A

We have discussed the requirements for punitive damages in two recent "failure to warn" cases.[5] In *Lakin v. Senco Products, Inc.*, 144 Or.App. 52, 925 P.2d 107 (1996), *aff'd* 329 Or. 62, 987 P.2d 463, *on recons.* 329 Or. 369, 987 P.2d 476 (1999), the evidence permitted the jury to find the following facts. The plaintiff was seriously injured when a nail gun that the defendant manufactured double-fired in a way that led to a third firing that sent a nail into the plaintiff's brain. The defendant was aware of the nail gun's tendency to double fire, but it conducted no tests to determine how frequently it did so or what injuries might result from a double firing. If it had conducted those tests, the defendant would have known of the gun's potential for injury and could have easily changed both the gun's design and the accompanying warnings. The jury could have believed that the defendant's decisions not to conduct tests or to issue better warnings were

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5. Defendant has moved for leave to file a memorandum on remand concerning the appropriateness and amount of the award of punitive damages. We deny the motion. We discuss all but one of the cases that defendant mentions in the course of analyzing the issues. The remaining case, *Cooper Industries, Inc. v. Leatherman Tool*, 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001), concerns the standard of appellate review of a trial court's action on a motion to reduce an award of punitive damages as excessive. Assuming that the Court was stating a requirement of due process rather than exercising its supervisory authority, we understand *Leatherman* to require us to review the amount of a punitive damages award as a matter of law, without deferring to the trial court's judgment. That, at least, appears to be what the Court means by "*de novo*" review of legal questions, a concept that Oregon courts do not use. *See Trabosh v. Washington County*, 140 Or.App. 159, 163 n. 6, 915 P.2d 1011 (1996). In any case, we have reviewed the relevant issues consistently with the court's holding in *Leatherman*.

motivated, at least in part, by its desire to sell additional nails, which were a major source of its profits from the gun. We concluded that, if the jury found those facts to be true, they could provide clear and convincing evidence that the defendant's conduct satisfied the requirements of ORS 30.925.[6] *Lakin*, 144 Or.App. at 71-74, 925 P.2d 107.

In *Axen v. American Home Products Corp.*, 158 Or.App. 292, 974 P.2d 224, *on recons.* 160 Or.App. 19, 981 P.2d 340, *rev. den.* 329 Or. 357, 994 P.2d 124 (1999), *cert. den.* 528 U.S. 1136, 120 S.Ct. 979, 145 L.Ed.2d 930 (2000), the defendant warned that optic neuritis was a rare side effect of using a drug that it manufactured, but it did not warn that optic neuropathy resulting in vision loss was also a side effect. There was evidence that the defendant knew of the danger and effect of optic neuropathy and made a conscious decision not to warn about that side effect, at least in part because of the possible effect of a warning on the defendant's ability to market the drug. Thus, there was evidence from which the jury could conclude, by clear and convincing evidence, that the defendant acted with a disregard of or an indifference to a known risk to consumers out of a motive for profit. 158 Or.App. at 311-13, 974 P.2d 224.

Defendant relies heavily on *Andor v. United Air Lines*, 303 Or. 505, 511-13, 739 P.2d 18 (1987), in which the Supreme Court discussed punitive damages in a negligence case. In *Andor*, the court explained that the issues for a trial court to consider in determining whether punitive damages

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6. On review, the Supreme Court agreed with our conclusions in that regard. *Lakin*, 329 Or. at 82-84, 987 P.2d 463.

might be appropriate in a particular case are similar to, although balanced differently from, the issues in a claim for intentional infliction of emotional distress. It summarized those issues by stating that "[p]unitive damages * * * are a penalty for conduct that is culpable by reason of motive, intent, or extraordinary disregard of or indifference to known or highly probable risks to others." 303 Or. at 517, 739 P.2d 18. *Andor* involved an airplane crash that was the result of the combination of a repair to a landing gear that led the crew to be uncertain whether the gear had properly extended and the pilot's unwillingness to accept assurances that the landing gear was safe. In holding that punitive damages were not appropriate, the court stated that the evidence showed only that the company and the pilot had each acted negligently. The accident was the result of a negligent repair combined with a reaction by the pilot that the jury could find to be foreseeable. That evidence was sufficient to subject the company to liability for compensatory damages, but it was insufficient to support an award of punitive damages. The Supreme Court explained,

> "[M]ere failure to foresee the pilot's reactions is not enough for punitive damages. If this sufficed, it would support a claim for punitive damages whenever some persons within an organization failed to anticipate foreseeable risks of substandard performance by others in the organization. For punitive damages, some *conscious disregard* of or *highly irresponsible indifference* to this human element in the decision on equipment is required." *Andor*, 303 Or. at 517, 739 P.2d 18 (emphasis added).

Defendant argues here that, as in *Andor*, the most that plaintiff has shown is that it acted negligently in several ways and that one kind of negligence, added to another kind of negligence, does not provide a basis for punitive damages. However, defendant ignores some crucial aspects of the evidence. According to defendant's product engineering manager, he had not known before this lawsuit of any previous injuries from defendant's fishbowls, nor did he know whether defendant had ever studied whether chips or dings might lead to an unexpected shattering from the weight and force that water would exert on a fishbowl during its ordinary use. Moreover, defendant had no consistent policy concerning retention of documents or complaints filed against it for fishbowls that injured people. Although defendant's representative agreed that the corporation had the responsibility to build into its data collection system a way to know what was happening to its products once they were put into the hands of consumers, he admitted that the company continued to destroy documents that were more than five years old. The manager was also unaware of any market research to determine whether customers appreciated the latent hazards that might accompany the normal use of a fishbowl.

Based on that evidence, the jury could have found that the evidence was clear and convincing that defendant was aware of the risk to consumers created by its product, consciously chose to ignore that information, and continued to market its product without a warning. The jury could also have found that the preparation and the distribution of a warning to accompany the fishbowls would have imposed only insignificant costs on defendant. In our view, that conscious

indifference to the possibility that the fishbowl could injure someone during ordinary use and the failure to warn of that possibility cause this case to fall within the criteria of ORS 30.925(3). Such evidence implies a wilful disregard of a known risk to consumer safety, distinguishes this case from the ordinary negligence in *Andor*, and makes it more like the profit-motivated, conscious disregard of risks that existed in *Lakin* and *Axen*. We conclude that the evidence was sufficient to permit the jury to award punitive damages under the statute.

Defendant next argues that the amount of punitive damages that the jury awarded was grossly excessive under the Fourteenth Amendment.[7] In *Parrott v. Carr Chevrolet, Inc.*, 331 Or. 537, 17 P.3d 473 (2001) the Supreme Court evaluated the standards for post-judgment review of punitive damage awards in light of *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), and *Honda Motor Co. v. Oberg*, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994). It summarized its conclusions:

"A jury's punitive damages award is not 'grossly excessive' — and, therefore, will not be disturbed on review — if it is within the range that a rational juror would be entitled to award in light of the record as a whole. * * * [T]he range that a rational juror would be entitled to award depends on the following: (1) the statutory and common-law factors that allow an award of punitive damages for the specific kind of claim at issue * * *; (2) the state interests that a punitive

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7. Defendant followed the appropriate post-trial procedures for raising this issue.

damages award is designed to serve * * *; (3) the degree of reprehensibility of the defendant's conduct * * *; (4) the disparity between the punitive damages award and the actual or potential harm inflicted * * *; and (5) the civil and criminal sanctions provided for comparable misconduct[.]" *Parrott*, 331 Or. at 555, 17 P.3d 473.

We have already discussed most of the statutory factors that permit an award of punitive damages. As to the other statutory factors, there is no evidence of any other punishment imposed on defendant for these actions, and the amount of the award is approximately one month of defendant's net profit.

We turn to the remaining factors that *Parrott* describes. The primary state interest involved is preventing injury to Oregonians from defective products. Punishing manufacturers who fail to investigate the safety of their products after learning of injuries that these products caused furthers that interest, and ORS 30.925 puts manufacturers on notice that such punishment is a possibility. In addition, there is no evidence that defendant received any other civil or criminal punishment for this conduct. The final factor is the relationship between the punitive damages award and the actual damages that plaintiff suffered. Plaintiff's injuries were serious, and her damages were substantial. Even after reducing the jury's award of compensatory damages to reflect plaintiff's 25 percent share of the fault, the judgment in her favor for those damages exceeds $100,000. It is common knowledge that broken glass is dangerous and can cause serious injuries. We cannot say that it is excessively disproportionate to punish a company that makes glass products that can cause the degree of damage that plaintiff suffered by an award that is no more than ten times the actual injury that its actions

caused.[8] That is particularly the case when a defendant, as the defendant here, consciously ignores indications that its product is unsafe. We conclude that the $1 million punitive damage award is within the range that a reasonable juror could award under the criteria that the court identified in *Parrott.*

Defendant's final argument is that the court should have reduced the award of punitive damages to reflect plaintiff's share of the fault for her injuries. It argues that ORS 18.470(1) requires that result because the statute refers to "any damages."[9] Defendant confuses apples with oranges. The purpose of ORS 18.470 is to replace contributory negligence as an absolute defense to a negligence action with comparative fault. The effect of the statute is that the defendant is not required to pay the plaintiff for that portion of the plaintiff's actual damages that are the result of the plaintiff's own fault. The words "any

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8. In *Parrott*, where the defendant's actions were more reprehensible but the only injury was economic, the Supreme Court approved a punitive damages award that was 87 times the compensatory damages. By making these comparisons, we do not mean to suggest that any particular ratio between compensatory and punitive damages is or is not excessive.

9. ORS 18.470(1) provides:

"Contributory negligence shall not bar recovery in an action by any person or the legal representative of the person to recover damages for death or injury to person or property if the fault attributable to the claimant was not greater than the combined fault of all persons specified in subsection (2) of this section, but any damages allowed shall be diminished in the proportion to the percentage of fault attributable to the claimant. This section is not intended to create or abolish any defense."

damages" in the statute have nothing to do with punitive damages, which are not intended to compensate a plaintiff for his or her injuries. Rather,

> "[t]he legal doctrine of punitive damages is founded on the theory that certain intentional acts should be punished or deterred. Punishment and deterrence concern behavior that society finds undesirable. Punishment and deterrence are not related to actual or compensatory damages. Punitive damages are not to compensate an injured party, but to give bad actors a legal spanking." *Lane County v. Wood*, 298 Or. 191, 203, 691 P.2d 473 (1984).

That the jury found that plaintiff was partly responsible for the events that led to her injuries has nothing to do with the reprehensibility of defendant's conduct or the appropriate punishment for it. Plaintiff did not contribute to the conduct that justifies giving defendant a legal spanking; thus, there is no reason that the fact that she did contribute to the conduct that caused her injuries should affect the severity of that spanking.[10]

Affirmed.

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10. Defendant also relies on *Seiders v. Hefner*, 89 Or.App. 55, 747 P.2d 1003 (1987), *rev. den.* 305 Or. 576, 753 P.2d 1382 (1988), in support of its argument. It points to that case as an example of where we affirmed a punitive damage award that had been reduced by the amount of the plaintiff's comparative fault. However, the issue raised here by defendant was not raised in *Seiders*.

APPENDIX B — DECISION BY THE CIRCUIT COURT OF MULTNOMAH COUNTY, OREGON DATED SEPTEMBER 22, 1995

Fax Communication
from
Judge Robert P. Jones
Circuit Court, Multnomah County
1021 SW 4th Avenue
Portland, Oregon 97204

Telephone (503)-248-3038 **FAX (503)-248-3028**

September 22, 1995

To: Attorneys: Stephen Walters, Michael Gentry, Kathryn Clarke and Lawrence Wobbrock

Subject: Waddill v. Anchor Hocking — A9405-03390

Decision on defendant's post-trial motions.

1. To set aside punitive damage award — denied.
2. To remit the amount of the punitive damage award — denied.
3. To set-off the comparative negligence percentage on the punitive damages — denied.

Plaintiff will prepare an order in conformity with this ruling.

APPENDIX C — DECISION BY THE CIRCUIT COURT OF MULTNOMAH COUNTY, OREGON DATED NOVEMBER 14, 1995

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

No. 9405-03390

ARLEEN R. WADDILL

Plaintiff,

-vs-

ANCHOR HOCKING INC. a Delaware Corporation,

Defendant.

ORDER RE: DEFENDANT'S
POST-TRIAL MOTION
TO DISMISS OR FOR NEW TRIAL

Defendant's Post Trial Motion to Dismiss or For New Trial having been argued before The Honorable Robert P. Jones on the 7th day of November, 1995, with plaintiff, appearing by and through her attorneys, Lawrence Wobbrock and Kathryn H. Clarke, and defendant, appearing by and through its attorneys, Stephen Walters, Robert H. Riley, and Catherine Masters Epstein. The court having read the parties' submissions, and heard argument by counsel, now Orders that:

Appendix C

Defendant's Post Trial Motion to Dismiss or For New Trial are denied in their entirety.

DATED: this 14th day of November, 1995

/s/ ROBERT P. JONES
ROBERT P. JONES
Circuit Court Judge

Submitted by:
Lawrence Wobbrock, OSB #77391
1020 S.W. Taylor, Suite 800
Portland, OR 97205
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Of Attorneys for Plaintiff

APPENDIX D — DENIAL OF PETITION FOR REVIEW BY THE OREGON SUPREME COURT DATED JUNE 4, 2002

IN THE SUPREME COURT OF THE STATE OF OREGON

CA A91012
SC S48940

ARLEEN R. WADDILL

Respondent/Respondent

v.

ANCHOR HOCKING INC.

Appellant/Petitioner

ORDER DENYING REVIEW

The Court has considered the petition for review and orders that it be denied.

DATE: June 4, 2002.

/s/ WALLACE P. CARSON, JR.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

No. 02-370

Supreme Court U.S.
FILED
NOV 1 2002
OFFICE OF THE CLERK

In The

Supreme Court of the United States

ANCHOR HOCKING, INC.,

Petitioner,

v.

ARLEEN E. WADDILL,

Respondent.

On Petition For A Writ Of Certiorari To The Oregon Court Of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does Oregon's process of appellate review of the size of a punitive damage award comport with the Due Process Clause?

LIST OF PARTIES

The case caption includes the names of all parties. Respondent Arleen E. Waddill is an individual. Petitioner Anchor Hocking, Inc. is a subsidiary of Newell Rubbermaid Inc., which is a publicly traded company.

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RESPONDENT'S BRIEF IN OPPOSITION

The petition for writ of certiorari should be denied. Oregon's process of appellate review of punitive damages awards in civil cases is constitutionally sound. It complies with the constitutional requirements for review of jury determinations in *criminal* cases and it incorporates the constitutional standards of *BMW of North America, Inc. v. Gore,* 517 US 559, 116 S Ct 1589, 134 L Ed 2d 809 (1996) without deference to the lower court's decision.

OPINIONS BELOW

The trial court's decisions are unreported. The opinion of the Oregon Court of Appeals is reported at 175 Or App 294, 27 P3d 1092 (2001) and is reprinted at page 1 of the Appendix to the Petition for Writ of Certiorari. The decision of the Oregon Supreme Court denying review is reported at 334 Or 260, 47 P3d 486 (2002).

STATEMENT OF THE CASE

Defendant understandably avoids any recitation of the evidence in support of the punitive damages award, as it amply supports the jury's verdict. *See* Pet. App. A, 9a-18a. Instead Anchor Hocking drops references to plaintiff's "cut hand," and the so-called "facts" underlying the prior claims which proved Anchor Hocking's notice of the hazard presented by its fishbowl.

Much of the evidence Anchor Hocking now relies on in mitigation of the prior complaints of injury was not submitted at trial, was not part of the record before the jury,

and thus cannot now be considered. The statements Anchor Hocking makes in its Petition at 3 regarding the disposition of the Bye and Gifford claims were not submitted until *after* the trial on a post-verdict motion to set aside or remit the punitive damages verdict. They form no part of the legitimate record on appeal and must be disregarded.

Anchor Hocking also claims an "absence of evidence that it 'concealed' records of its 'guilt.'" Petition at 6. In fact, Anchor Hocking stipulated to an instruction that told the jury that when asked to produce prior complaints of injury it did not do so.

Ms. Waddill suffered considerably more than a "cut hand." Anchor Hocking's fishbowl shattered explosively while she was carrying it, full of water and cradled in both hands, after cleaning it. Tr. 110. Shards of glass slashed her ulnar artery, lacerated her ulnar nerve, and severed a tendon in her left wrist; she also had a partial laceration to her right index finger and the nerve and artery on its side. Tr. 120-21.

Mrs. Waddill was taken to the hospital by ambulance, where she underwent a three-hour repair surgery. Tr. 123, 156. She had to rely on medication for control of her pain for more than a month, during which time she was dependent on the assistance of other family members for all personal care. Tr. 134, 139. The ulnar nerve damage resulted in wasting of the muscle in her hand; as a result, when she is fatigued she lacks the muscle power to extend her fingers, and they involuntarily form a claw. Tr. 124. She has difficulty moving her fingers in order to do simple hand movements, and has reduced sensitivity to touch; as a result she has difficulty doing anything that requires fine finger manipulation. Tr. 124-5, 164. The injury has

reduced her ability to use a typewriter keyboard as she has in the past; she will not have her former efficiency when she returns to her job selling insurance, as she planned to do when her children were older. Tr. 126, 108. Her physician testified that these sequelae are permanent. Tr. 124-6. She has abnormal sensitivities to heat and cold, which were still disturbing her at the time of trial, and which may persist for years and may also be permanent. Tr. 127-8, 136. She has permanent scars. Tr. 112.

The jury awarded plaintiff $134,472.00 in compensatory damages.

The evidence amply supports the punitive damage award. The jury learned that for almost 15 years prior to trial, Anchor Hocking failed to take any measures to protect consumers from a known, serious risk. Despite receiving notice of injuries, defendant never explored its responsibility to warn the public of the product's latent danger – that even a small crack or scratch (or, in the parlance of a materials scientist, a "singularity" or "defect"), in the normal course of use, could cause a fishbowl full of water to shatter simply from water pressure. Tr. 215-16. The information that would have alerted defendant to the need for warnings was its history of past injury claims – history to which defendant made no response and which it routinely discarded. Tr. 303. Although conceding that prior claims history was pivotal to determining the propriety of a warning (Tr. 304), upon learning of fishbowl injuries similar to plaintiff's, defendant ignored the danger and eventually destroyed the records that demonstrated it.

Anchor Hocking's record destruction policy was one manifestation, among many, of its conscious disregard for

the likelihood of personal injuries. Anchor Hocking's product engineering manager had never heard of a personal injury associated with the use of a fishbowl – despite the three prior claims against Anchor Hocking. Tr. 317. He "didn't know" whether Anchor Hocking's document retention policy would be changed as a result of her claim, and agreed that in five years Anchor Hocking's corporate memory would again be cleansed of prior claims. Tr. 477.

The jury learned that prior injuries had not prompted defendant to reconsider the safety of its fishbowls, to inform itself of consumers' normal uses of the product that might exacerbate the danger, or to warn of potential risks. They learned that this lawsuit, just like the others, would likely become a discarded corporate record with the same result: no change that would protect the next consumer from injury by a latent hazard. Tr. 477.

The Court of Appeals upheld the punitive damage award of $1 million under state law and the federal constitution. The Court reviewed the award without deference to the trial court's decision to uphold it. Pet. App. A at 11a, n. 5. It applied the constitutional standards of *BMW v. Gore*. *Id.*, at 15a-17a. It was persuaded that the award was lawful because, among other reasons, plaintiff's injuries were serious and her damages were substantial, defendant consciously ignored indications that its product was unsafe, and, even after reduction for plaintiff's fault, the ratio was less than 10:1 between punitive and compensatory damages, not a disproportionate punishment. The court concluded that the verdict was within the range that a reasonable juror could award. Pet. App. A at 17a.

PRESERVATION OF ERROR

Anchor Hocking relied on the "rational juror" standard of review in the trial court and failed to suggest any other template for review to meet due process requirements. In the Court of Appeals it accepted the rational juror standard without reservation in conjunction with the constitutional guideposts of *BMW v. Gore*. Similarly, it never suggested to the Oregon appellate courts that appellate review of the trial court's decision to uphold the jury's verdict was deficient under the Due Process Clause. It was not until this Court's decision in *Cooper Indus., Inc., v. Leatherman Tool Group, Inc.*, 532 US 424, 121 S Ct 1678, 149 L Ed 2d 674 (2001) – after the case had been decided in the Court of Appeals, reversed in the Supreme Court and remanded to the Court of Appeals for further adjudication – that defendant suggested anything different. The Court of Appeals on remand rejected Anchor Hocking's request to submit briefing on *Cooper*. Nonetheless, the court addressed *Cooper's* requirement for "de novo" review, held that it meant review as a matter of law without deference to the trial court's judgment, and reviewed the punitive damage amount accordingly. Pet. App. A, 11a.

With regard to extraterritoriality – the single hook on which Anchor Hocking seeks to hang its request to hold this petition pending disposition of *State Farm Mut. Auto Ins. Co. v. Campbell,* No. 01-1289 (certiorari granted June 3, 2002) – there is no properly preserved claim of error. Anchor Hocking never moved at trial to exclude the evidence of prior injuries on the basis of "extraterritorial" punishment. The prior injury complaints were properly admitted because they were substantially similar to this accident and proved Anchor Hocking's notice of a recurring

danger with its fishbowls; defendant never sought a limiting instruction. In addition, Anchor Hocking never sought at trial to exclude evidence of its net worth, or to restrict the evidence to its profits in Oregon on constitutional grounds. On post-verdict and post-judgment motions in the trial court Anchor Hocking did not assert that consideration of its net worth without reduction to profits derived in Oregon was an improper extraterritorial basis for the punitive damage award.

REASONS FOR DENYING THE WRIT

In Oregon both the trial court and the appellate courts review the jury's verdict in the same way: measuring whether, in light of state law standards and the substantive constitutional limitations imposed in *Gore,* a rational juror could reach the amount awarded. The problem *Cooper* addressed – the federal appellate court's deferential review of the trial court's excessiveness determination – does not exist in Oregon. An Oregon appellate court reviews the trial judge's legal determination of the lawfulness of the verdict for error of law; this means anew and without deference.

The "rational juror" standard comports with the requirements of the Due Process Clause in criminal convictions, including a jury's decision to impose the death penalty. It is consistent with the common law tradition of excessiveness review of damage awards – to ensure that the amount is reasonable.

This case involves serious, permanent personal injuries. The jury's award of significant compensatory

damages, coupled with Anchor Hocking's conscious indifference to the risk of this and future injuries, justified a correspondingly significant punitive damage award.

ARGUMENT

I.

OREGON DOES NOT HAVE A DEFERENTIAL REVIEW PROCESS FOR TRIAL COURT DETERMINATIONS OF EXCESSIVENESS.

From statehood until 1910 Oregon trial courts conducted a common law weight of the evidence review of jury verdicts challenged as excessive. Oregon trial courts were authorized to "weigh and consider all the evidence which has been submitted to the jury" and to set aside a verdict and grant a new trial if the trial court believed "that the verdict is against the clear weight [of the evidence], or is one that is manifestly unjust, or that reasonable men would not adopt or return[.]" *Serles v. Serles,* 35 Or 289, 293, 57 P 634 (1899).

The common law constrained the scope of appellate review of a trial judge's weight of the evidence decision. It was well settled in Oregon that a trial court's refusal to set aside a jury verdict as excessive could not be reviewed on appeal "because [that decision] does not present a question of law, but one of fact[.]" *Lindsay v. Grande Ronde Lumber Co.,* 48 Or 430, 438, 87 P 145 (1906); *Nelson v. Oregon R. & N. Co.,* 13 Or 141, 143, 9 P. 321 (1886) ("Nothing but questions of law appearing upon the transcript can be reviewed here.").

In 1910 Oregonians amended Article VII of the Oregon Constitution by initiative to limit the power of judges to set aside the factual determinations of juries. Section 3 of Amended Article VII provides in relevant part:

> In actions at law, where the value in controversy shall exceed $ 750, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict.

This amendment was directed primarily to trial judges; it eliminated the common law remittitur powers that trial judges had freely exercised. *Van Lom v. Schneiderman,* 187 Or 89, 99, 210 P2d 461 (1949), *overruled in part Honda Motor Co. v. Oberg,* 512 US 415, 114 S Ct 2331, 129 L Ed 2d 336 (1994) (the purpose of the amendment was "to eliminate, as an incident of jury trial in this state, the common law power of a trial court to reexamine the evidence and set aside a verdict because it was excessive or in any other respect opposed to the weight of the evidence.").

In *Honda Motor Co. v. Oberg*, this Court held that Oregon's constitutional limitation on the courts' reexamination of facts found by juries was inconsistent with the Due Process Clause of the Fourteenth Amendment as applied to the jury's determination of the amount of a punitive damage award. 512 US at 418, 432. This Court reviewed the near-universal common law tradition of judicial review of the size of damages awards and held that Oregon courts likewise must review the size of punitive damages awards. This was required in order to ensure that "those whose conduct is sanctionable by punitive damages are not subjected to punitive damages of

arbitrary amounts," and to ensure that the verdict is based on "evidence providing at least a *rational basis* for the particular deprivation of property imposed by the State to deter future wrongdoing." 512 US at 429. (Emphasis added).

The court did not decide "what standard of review is constitutionally required" but indicated that the formulations of state common law remittitur courts may be "rough equivalents" of the "rational trier of fact" standard of *Jackson v. Virginia,* 443 US 307, 324, 99 S Ct 2781, 61 L Ed 2d 560 (1979). 512 US at 432, n. 10.

On remand the Oregon Supreme Court applied the mandates of the Due Process Clause and reviewed the size of the punitive damage award as required. *Oberg v. Honda Motor Co.,* 320 Or 544, 549, 888 P2d 8 (1995), *cert den,* 517 US 1219 (1996). The court announced and applied a review process that incorporated the rational juror standard of *Jackson v. Virginia*:

> A jury's award of punitive damages shall not be disturbed when it is within the range that a rational juror would be entitled to award in the light of the record as a whole; the range that a rational juror would be entitled to award depends, in turn, on the statutory and common law factors that allow an award of punitive damages for the specific kind of claim at issue.[1]

---

[1] The Oregon judicial review process is now codified in ORS 18.537, which provides, in relevant part:

> (2) If an award of punitive damages is made by a jury, the court shall review the award to determine whether the award is within the range of damages that a rational

(Continued on following page)

In *Pacific Mut. Life Ins. Co. v. Haslip,* 499 US 1, 111 S Ct 1032, 113 L Ed 2d 1 (1991) and *TXO Production Corp. v. Alliance Resources Corp.,* 509 US 443, 113 S Ct 2711, 125 L Ed 2d 366 (1993) this Court held that the Fourteenth Amendment imposes both procedural and substantive constraints on punitive damages awards. It imposes procedural safeguards such as the requirement for adequate jury instructions and post-verdict judicial review. *Haslip,* 499 US at 23. *Haslip* noted that the constitutional purpose of judicial review was to "make[ ] certain that the punitive damages are "*reasonable* in their amount and *rational* in light of their purpose to punish what has occurred and to deter its repetition." 499 US at 21. (Emphases added). The Due Process Clause also sets substantive limits "beyond which penalties may not go." *TXO,* 509 US at 453-54 (internal quotations omitted).

In *BMW v. Gore,* the court announced substantive constitutional standards in the form of "guideposts." Those guideposts were intended to ensure that the principles of the Due Process Clause are met, namely to prohibit arbitrary awards that are excessive in light of the state's interests that punitive damages are designed to serve, and to provide notice of sanctionable conduct and the severity of punishment that may be imposed. *Gore,* 517 US at 574. A reviewing court must examine (1) the degree of

---

> juror would be entitled to award based on the record as a whole, viewing the statutory and common-law factors that allow an award of punitive damages for the specific type of claim at issue in the proceeding.

The statute was enacted in 1995 and became effective in September 1996. Both this case and *Parrott v. Carr Chevrolet, Inc.,* 331 Or 537, 17 P3d 473 (2001) arose before the statute went into effect.

reprehensibility of the defendant's conduct; (2) the disparity between the punitive damages award and the actual or potential harm inflicted; and (3) the civil and criminal sanctions provided for comparable misconduct. 517 US at 574-585.

In *Parrott v. Carr Chevrolet,* 331 Or 537, 17 P3d 473 (2001) the court addressed the appropriate standard for post-verdict judicial review of a punitive damages award in Oregon in light of *BMW v. Gore.* The court rejected defendant's contention that *Gore* "superseded" the rational juror standard of review. 331 Or at 554. The court stated that *Gore* did not change the existing constitutional standard – gross excessiveness. Rather, *Gore* emphasized that only a "grossly excessive" award enters the "zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." 331 Or at 554, *quoting Gore,* 517 US at 568. Nor did *Gore* exclude judicial consideration of other factors that might be relevant in assessing whether a punitive damages award is excessive. 331 Or at 553. The court continued:

> [W]e conclude that the guideposts announced in *Gore* are additional factors for the reviewing court in Oregon to consider as part of the *Oberg* (state) rational juror review. 331 Or at 554.

The court then announced the following review standard:

> Combining the factors announced by the Supreme Court in *Gore* with those announced by this court in *Oberg* (state), the range that a rational juror would be entitled to award depends on the following: (1) the statutory and common-law factors that allow an award of punitive damages for the specific kind of claim at issue, *Oberg*

> (state), 320 Or at 549; (2) the state interests that a punitive damages award is designed to serve, *Gore,* 517 US at 568; (3) the degree of reprehensibility of the defendant's conduct, *Gore,* 517 US at 575; (4) the disparity between the punitive damages award and the actual or potential harm inflicted, *Gore,* 517 US at 580; and (5) the civil and criminal sanctions provided for comparable misconduct, *Gore,* 517 US at 583, 331 Or at 555. (Emphasis added).

The court then addressed the constitutionally sensitive area of judicial review of facts found by the jury:

> Although application of the gross excessiveness standard is a question of law, we recognize that, as part of that application, the reviewing court must "re-examine" the facts in the record – a requirement that is contrary to Oregon law. 331 Or at 555.

But, as the court recognized, that conflict had already been addressed in *Oberg* on remand: "Under the Supremacy Clause, we are bound to follow the requirements of federal due process in the face of that conflict." 331 Or at 556, *quoting Oberg* (on remand), 320 Or at 548-49.

Parrott continued with the uncontroversial statement that the reviewing court must view the facts in the light most favorable to the jury's verdict if there is evidence in the record to support them. The court stated:

> In other words, the reviewing court must resolve all disputes regarding facts and factual inferences in favor of the jury's verdict and then determine, on the facts as the jury was entitled to find them, whether the award violates the legal

> standard of gross excessiveness. 331 Or at 556-557.

This, the court concluded, was consistent with *Gore,* 517 US at 579-80 (accepting jury's finding that BMW suppressed material fact that it was obligated to communicate to customers under Alabama law, but determining that BMW's omission was not sufficiently reprehensible to justify $2 million punitive damages award) and *Haslip,* 499 US at 13 (no reason to question jury finding when it is supported by record). As discussed *infra,* it is also consistent with *Cooper,* 532 US at 440, n. 14, and other recent opinions on which *Cooper* relied requiring "de novo" rather than deferential review of constitutionally sensitive, fact-bound rulings in the trial court. *United States v. Bajakajian,* 524 US 321, 336-337, n. 10, 118 S Ct 2028, 141 L Ed 2d 314 (1998); *Ornelas v. United States,* 517 US 690, 697, 699, 116 S Ct 1657, 134 L Ed 2d 911 (1996).

II.

OREGON APPELLATE REVIEW FOR ERROR OF LAW COMPORTS WITH DUE PROCESS.

Anchor Hocking vilifies the Oregon courts for repeatedly "def[ying]" this Court's requirement for judicial review of punitive damage awards. Petition at 6, 9. It describes *Oberg* (on remand) and *Parrott* as "forbid[ding] independent judicial scrutiny," as providing review "in form but not in substance" and as requiring "complete deference to the jury unless the verdict was completely irrational." Petition at 7.

Even a cursory review of the *Parrott* decision belies Anchor Hocking's histrionics. There, the Supreme Court gave no deference to the trial judge's rationale for reducing

the verdict of $1 million to $50,000. The court engaged in a thorough review of the evidentiary record applying first the common law and then the constitutional factors set forth in *Gore*. 331 Or at 559-66. Similarly here, the Court of Appeals gave no deference to the trial court's decision upholding the punitive damage award. It undertook its own assessment of the evidence for compliance with the statutory and constitutional standards. Pet. App. A at 11a-17a.[2]

Anchor Hocking argues a point that plaintiff does not controvert: that the *BMW* guideposts call for "legal conclusions," "legal inquiries," and the exercise of an "inherently legal function." Pet. Cert. at 14-15. Anchor Hocking's assertion that the Oregon courts refuse to engage in this process – and, in particular, its invocation of *Cooper* – simply reflects its ignorance of the Oregon review procedure.

Like certain litigants before the Court in *Cooper*, Anchor Hocking merges the concepts of the proper standard for reviewing the District Court's due process determination – the issue addressed in *Cooper* – with the question of the substantive standard for determining the verdict's conformity with due process in the first instance. 532 US at 432, n. 4. As addressed in Section A below, Oregon courts review the trial court's due process determination without deference. The Oregon courts identify the latter as the "rational juror" standard. As addressed in

[2] This should be compared with the Ninth Circuit's cursory review of the award in *Leatherman Tool Group, Inc. v. Cooper Indus. Inc.*, 205 F3d 1351 (9th Cir 1999), *rev'd*, 532 US 424 (2001). Without any mention of *Gore*, the court simply stated that the trial court's evidentiary findings in support of due process were supported by evidence and it did not abuse its discretion in refusing to reduce the award.

Section B below, a review standard that measures the rationality of a jury's award in terms of the *Gore* standards fully comports with due process.

A. Oregon appellate courts review excessive verdict claims for error of law without deference to the trial court.

In contrast to review of a jury's factual determinations, Oregon courts have never been restricted by common law or constitution in the manner in which they conduct review for errors of law. When an appellate court reviews a trial judge's legal determinations, it does so "anew," and "without deference to the decisions of trial courts." *State v. Rogers,* 330 Or 282, 312 n. 8, 4 P3d 1261 (2000). In *Rogers* the court explained its process and terminology as follows:

> To say that a trial court necessarily abuses its discretion if it applies the wrong principle of law or incorrectly applies the correct rule of law leads to the same result. However, the formulation that we have set out is more straightforward and correctly distinguishes that we do not defer to trial courts' legal determinations. To say that an appellate court should review the legal aspects of an evidentiary ruling for abuse of discretion and that a trial court abuses its discretion if it makes a legal error unnecessarily complicates a simple principle, *i.e.,* that appellate courts review questions of law anew without deference to the decisions of trial courts. 330 Or at 312 n. 8. (Emphasis added).

Unlike a trial court's discretionary ruling, in which the trial judge has authority "to choose among several legally correct outcomes" any of which may be affirmed if

supported by the record, an issue of law "can yield only one correct answer." *State v. Rogers,* 330 Or at 311-312; *State v. Titus,* 328 Or 475, 481, 982 P2d 1133 (1999). A trial court "has no discretion" to reach a legally erroneous conclusion. *State v. Rogers,* 330 Or at 312 *quoting State v. Titus*, 328 Or at 481. There is no deference given to the trial court's interpretation of the law. *Id.*

The trial court's review of the size of a punitive damage award is a legal ruling that the Oregon appellate courts review "anew" and without deference. It was for this reason that in its decision on remand in *Oberg* the Oregon Supreme Court chose to review the size of the punitive damages award itself rather then send the case back to the trial court. As the court stated, the Oregon Supreme Court was

> in as good a position as would be the trial court to apply a legal standard to the evidence in the record. *Oberg* (on remand), 320 Or at 552.

The court also recognized the value of appellate decisions in the development of unified precedent, an issue of concern in this Court's recent discussions of the standard of appellate review. *Ornelas,* 517 US at 697; *Cooper,* 532 US at 436. The Oregon court stated that

> by applying the new standard to the facts in this case, we may be able to give some guidance to trial courts that will need to follow this standard in the future. *Id.*

Clearly, the Oregon Supreme Court has not shirked its responsibility to give "meaningful content through case-by-case application at the appellate level" to punitive damage review. *Cooper,* 532 US at 436.

In a punitive damages case the trial court's legal determinations which are subject to non-deferential review for error of law include the sufficiency of the evidence to support punitive liability, the adequacy and accuracy of jury instructions, and – since this Court's decision in *Honda Motor Co. v. Oberg*, *supra* – evaluation of a jury's award of punitive damages for compliance with the substantive due process standards that prevent an unconstitutionally excessive verdict. Thus, this court's decision in *Cooper* requires nothing that Oregon does not already provide litigants seeking review of punitive damages verdicts.

In *Cooper*, this Court addressed the standard of appellate review by which a federal appellate court is to review a federal district court's decision regarding the constitutionality of a jury's punitive damage award. Historically, the Seventh Amendment of the U.S. Constitution forbad a federal appeals court from reviewing a trial judge's refusal to set aside a jury award of compensatory damages on the ground that they were excessive. This Court modified that rule several years before *Cooper* to allow federal appellate courts to review district court determinations for abuse of discretion, at least in diversity cases when the substantive state law provided for that kind of appellate review. *Gasperini v. Center for Humanities, Inc.*, 518 US 415, 116 S Ct 2211, 135 L Ed 2d 659 (1996).

In *Cooper*, the court imposed a "de novo" standard of review in a punitive damages case, rather than the more deferential abuse of discretion standard of review advocated by the plaintiff. It did so on the strength of criminal law decisions that, like punitive damage review, also required the application of a constitutional standard to the

facts of a particular case. 532 US at 435-436. *Ornelas* (the determination of reasonable suspicion and probable cause); *Bajakajian* (the constitutional proportionality of a criminal fine).

Cooper and the cases on which it relies make clear that "de novo" review is the same thing as Oregon's review for error of law. It is not a process of reweighing the evidence:

> [N]othing in our decision today suggests that the Seventh Amendment would permit a court, in reviewing a punitive damages award, to disregard such jury findings [relevant to the considerations on which the jury was instructed in awarding an amount of punitive damages]. 532 US at 439-440, n. 12.

To the contrary, *Cooper* reaffirms the jury's role as primary fact-finder in a "fact-sensitive undertaking" which appropriately relies on jury discretion. 532 US at 437-38, n. 11. *Ornelas* directs that the factual findings as well as the inferences drawn from them by the trial court cannot be disturbed unless clearly erroneous. *Ornelas,* 517 US at 699; *see also Bajakajian,* 524 US at 336-337, n. 10.

The "de novo" review contemplated in *Cooper* means non-deferential review of the trial court's determination about the lawfulness of the punitive damages award. *Ornelas,* 517 US at 697 ("We think independent appellate review of these ultimate determinations of reasonable suspicion and probable cause is consistent with the position we have taken in past cases. We have never, when reviewing a probable-cause or reasonable-suspicion determination ourselves, expressly deferred to the trial court's

determination."). This is the kind of review Oregon appellate courts conduct in addressing a challenge to the size of a punitive damage award.

B. The rational juror standard, identified by this Court and adopted in Oregon in *Oberg*, comports with due process.

Parrott makes "the range that a rational juror would be entitled to award" "depend[ent] on" state law and substantive constitutional standards. 331 Or at 555. This adaptation of the rational juror standard fully comports with due process. In *Jackson v. Virginia,* this Court held that the Fourteenth Amendment required a reviewing federal habeas corpus court to discern whether any rational trier of fact could have convicted based on the evidence.

The Oregon Supreme Court has interpreted the "rational juror" standard of review as more stringent than the "no evidence" standard set forth in Article VII (Amended), section 3, of the Oregon Constitution. *State v. Harris,* 288 Or 703, 721, 609 P2d 798 (1980). Oregon must apply it in criminal cases as a matter of federal constitutional law. *Id.* ("In criminal cases * * * this court is bound to conform to requirements imposed by the Constitution of the United States as interpreted by the Supreme Court of the United States." 288 Or at 721.).

The "rational juror" standard applies to a jury's decision to impose the death penalty, as well as to criminal convictions. *State v. Moore,* 324 Or 396, 431, 927 P2d 1073 (1996). In *Moore*, the court held that it provides meaningful review of decisions in which the jury exercises discretion in invoking the death penalty. The court applied the

rational juror standard to review of an additional statutory jury question unlike others involving more traditional evidentiary review – "whether the defendant should receive a death sentence." 324 Or at 430. The court acknowledged that the question framed a "discretionary determination" without a burden of proof requirement like the other questions. 324 Or at 432, 433. Nonetheless, the court held, review under a rational juror standard was appropriate because the jury's decision "still must be based upon the evidence presented at trial." 324 Or at 433.

So here. Constitutional excessiveness review, framed in terms of the rational juror standard, comports with this Court's constitutional jurisprudence.

Anchor Hocking criticizes the rational juror standard as too deferential to the jury. Yet it is entirely consistent with the traditional common law approach by which remittitur courts review the amount of the award:

> Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that is it reasonable. *Haslip,* 499 US at 15. (Emphasis added).

This Court continued to emphasize the primary role of the jury as fact-finder in punitive damages cases in *Cooper,* 532 US at 440, n. 14. In *Ornelas,* 517 US at 699, the Court explained that on *de novo* review of determinations of reasonable suspicion and probable cause, the reviewing court should nonetheless "take care both to review findings of historical fact only for clear error and to give due

weight to inferences drawn from those facts by resident judges and local law enforcement officers." *See also Bajakajian,* 524 US at 336-337.

This corresponds with the rational juror standard as it is applied in criminal cases. In *Herrera v. Collins,* 506 US 390, 113 S Ct 853, 122 L Ed 2d 203 (1993), this Court stated:

> [T]he *Jackson* inquiry does not focus on whether the trier of fact made the correct guilt or innocence determination, but rather whether it made a rational decision to convict or acquit. 506 US at 402. (Emphasis in original).

In *Anderson v. Fuller,* 455 US 1028, 102 S Ct 1734, 72 L Ed 2d 150 (1982), dissenters from the denial of *certiorari* criticized the federal judges below on habeas review who set aside a conviction under the *Jackson v. Virginia* review standard: they "acted like jurors, not jurists." 455 US at 1033.

Oregon's review of punitive damage awards for constitutional excessiveness under a rational juror standard comports with the Due Process Clause. Under that standard Oregon provides the kind of non-deferential appellate review for legal error which this Court has required in *Cooper, Bajakajian* and *Ornelas.* While Oregon courts do not call it "de novo,"[3] review for error of law

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[3] In *Trabosh v. Washington County,* 140 Or App 159, 915 P2d 1011 (1996), the court addressed the differences between federal and state terminology for review standards:

> We do not, as plaintiff states, review questions of law "de novo." That term derives from appellate review of equity cases and refers solely to the court's ability to make its own

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means an independent, non-deferential, look at the challenged legal ruling of the trial court. This is what the Due Process Clause requires; this is what Anchor Hocking got.

III.

THE EXCESSIVE FINES CLAUSE DOES NOT APPLY IN THIS CIVIL CASE.

In *Bajakajian*, this Court eliminated from the scope of the Excessive Fines Clause all but those monetary punishments that are directly connected with the prosecution of crime. The Court made reference to *Austin v. U.S.*, 509 US 602, 113 S Ct 2801, 125 L Ed 2d 488 (1993), which held that *in rem* forfeiture of property as punishment for violation of drug laws was subject to the Eighth Amendment limitation on excessive fines. 524 US at 331, n. 6. At the same time it distinguished civil *in rem* proceedings in which the instrumentality of crime could be forfeited without implicating the Excessive Fines Clause. 524 US at 333-334 and n. 8. Anchor Hocking has not been subjected to any criminal proceeding. The state is not a party to this civil proceeding. The jury is not even permitted to be told that the state is entitled to a share for the punitive damages award. *Honeywell v. Sterling Furniture Co.*, 310 Or 206, 797 P2d 1019 (1990).

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determination of the facts when it has the authority to "try the cause anew upon the record." See ORS 19.125(3). 140 Or App at 164, n. 6. (Emphasis in original).

The court explained that federal courts use the phrase "de novo" to describe review of issues of law as well as of fact, but in Oregon "it applies only to issues of fact." *Id.*

This Court's analysis in *Browning-Ferris v. Kelco Disposal,* 492 US 257, 109 S Ct 2909, 106 L Ed 2d 219 (1980) clearly indicates that the Excessive Fines Clause has no application to private litigation where the government takes no prosecutorial role. 492 US at 275-6 and n. 21. The Court reasoned:

> [T]he history of the Eighth Amendment convinces us that the Excessive Fines Clause was intended to limit only those fines *directly imposed by*, and payable to, the government. 492 US at 268. (Emphasis added).

This punitive damage award neither follows from nor arises out of a criminal process. In *Austin*, this Court held that the Eighth Amendment limits the amount the federal government may recover in a civil action, after the defendant already has been punished through the criminal process. There, the defendant faced seven years of imprisonment in addition to property forfeiture. In *Alexander v. U.S.,* 509 US 544, 113 S Ct 2766, 125 L Ed 2d 441 (1993) this Court held that *in personam* forfeiture of property as punishment for criminal racketeering was subject to the Eighth Amendment. There, the defendant faced six years of imprisonment, $100,000 fine, reimbursement for costs of prosecution, supervision in addition to property forfeiture. In *Bajakajian*, defendant was prosecuted by the federal government for a criminal law violation; he was sentenced to a term of probation and fined, in addition to facing forfeiture of the currency he was unlawfully transporting. Imposition of punitive damages in a civil proceeding is entirely different from the forfeitures imposed in these criminal prosecutions. The Excessive Fines Clause does not apply to a punitive damage award.

IV.

THERE IS NO ISSUE PROPERLY BEFORE THIS COURT THAT IMPLICATES "EXTRATERRITORIALITY" CONCERNS.

Even if this Court were to disregard its customary requirement for proper preservation of error, Anchor Hocking presents no colorable issue of extraterritorial punishment.

One of the prior injuries occurred in Tennessee. The other two took place in Oregon. The jury was never asked to increase or multiply the amount of punitive damages to punish for any of these prior occurrences. The mere fact of another injury from another state does not establish unlawful, extraterritorial punishment. *TXO* rejected the contention that evidence of wrongdoing in other parts of the country and of the corporate defendant's net worth were impermissible: "Under well-settled law * * * factors such as these are typically considered in assessing punitive damages." 509 US at 462, n. 28. *Gore* expressly noted that evidence of similar occurrences in other states is relevant to show the wanton character of defendant's conduct: "such evidence may be relevant to the determination of the degree of reprehensibility of the defendant's conduct." 517 US at 574, n. 21.

CONCLUSION

The Petition for a Writ of Certiorari should be denied. Moreover, there is no issue involving extraterritoriality that warrants holding this case pending disposition of *State Farm v. Campbell*.

DATED this 1st day of November, 2002.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ANCHOR HOCKING, INC.,

Petitioner,

v.

ARLEEN E. WADDILL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OREGON COURT OF APPEALS

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *iii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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ARGUMENT

Oregon formulated the "rational juror" standard following *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994) ("*Oberg (federal)*"), modeling it, as the Respondent herself emphasizes, on an expressly deferential "rational factfinder" standard for reviewing findings of historical facts.[1] Oregon has adhered to this standard even after *BMW v. Gore*, 517 U.S. 559 (1996), and *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), held that the amount of punitive damages is not a "fact," and must be subject to de novo review that encompasses considerations of matters outside the record and beyond the jury's competence.

This case is not about an isolated judicial error that resulted in an aberrant million dollar punitive award. This Court receives a steady diet of petitions concerning Oregon civil judgments (*e.g.*, *Key Pharmaceuticals v. Edwards*, No. 02-342 (petition for a writ of certiorari filed August 30, 2002; amicus briefs filed by Associated Oregon Industries (October 4, 2002) and the American Insurance Association (October 7, 2002); held after conference on November 8, 2002)) because the Oregon courts have persistently refused to conform their punitive damages standard of review to the constitutional guidelines articulated by this Court.

The Respondent fails even to address the application of the *BMW/Cooper* standard to this case, a failing that mirrors the

1. As the Respondent states (Opp. at 9, 19), the template for Oregon's "rational juror" standard was *Jackson v. Virginia*, 443 U.S. 307 (1979), which held that

> a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume — even if it does not affirmatively appear in the record — that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution,

and that the court may allow habeas relief only if "no rational factfinder" so viewing the record evidence could have found proof of guilt. *Id.* at 324-26.

error of the Oregon courts themselves. For example, the Oregon Court of Appeals in this case made no effort at all to apply the third *BMW* factor, comparability of the punitive award to legislative penalties. Confronted with evidence that the Oregon legislature — the body to whom the Court has said lower courts *should* defer — had prescribed penalties 1/200 the size of the punitive award in this case for conduct more egregious than anything Anchor Hocking was even accused of, the Oregon Court of Appeals simply ignored the evidence and the required comparison.[2] The Respondent also fails to acknowledge the conflict in the lower courts about the applicability of the Excessive Fines Clause, a stark conflict appropriate for review.

Finally, *State Farm v. Campbell*, No. 01-1289 (set for argument December 11, 2002) cannot be brushed aside as a reason to grant review or hold this case, on the ground that *State Farm* involves only extraterritoriality. *State Farm* plainly involves the applicability of the *BMW* guideposts, as well as the constitutionality of extraterritorial punishment. *See* Petition for a Writ of Certiorari in *DeKalb Genetics Corp. v. Bayer Crop Science S.A.*, No. 02-130 (filed July 24, 2002, held after conference on September 30, 2002) at 7-8, 22-24; *Key* Petition

2. Indeed, the Oregon Court of Appeals apparently believed that the comparative penalties guidepost required analysis only of other punishments that had been imposed *on Anchor Hocking* for the actions giving rise to this lawsuit (failing to warn that perfectly manufactured and designed fishbowls may develop imperceptible cracks and failing to keep records of three prior manufacturing-defect lawsuits). *Waddill v. Anchor Hocking*, 175 Or. App. 294, 306, 27 P.3d 1092, 1099 (2001) (16a). Whether a defendant has been previously punished for its alleged misconduct is an element of the Oregon substantive standard for determining whether to award punitive damages at all, incorporated by reference into the "rational juror" standard. *Id.* at 301-02, 27 P.3d at 1096 (9a-10a), *citing* ORS 30.925. It is not, however, part of the *BMW/Cooper* standard, nor is it a substitute for the comparative penalties analysis that *BMW/Cooper* require. Indeed, part of the failing of the "rational juror" standard is that it points to statutory considerations that concern whether punitive damages should be awarded at all, and not how much should be awarded.

at 13, 30 (held after conference on November 8, 2002). In any event, this case, like *State Farm*, does involve an issue of extraterritoriality, for the punitive damages award below was based upon alleged misconduct outside Oregon, and its scale was determined by the Petitioner's nationwide sales activity.

I. The Errors Have Been Preserved.

The Respondent asserts that Anchor Hocking waived the constitutional issues, claiming that it cited only the state "rational juror" standard in challenging the $1 million punitive damages award in this case. Opp. at 5. That is untrue. Anchor Hocking has contended — consistently, for more than seven years — that the award violates the federal Due Process and Excessive Fines Clauses. The Oregon Court of Appeals itself recognized that Anchor Hocking "filed the appropriate post-trial motion for raising [the federal excessiveness] issue." *Waddill*, 175 Or. App. at 305 n.7, 27 P.3d at 1098 n.7 (15a).

The record confirms Anchor Hocking's preservation of constitutional error. First, during trial, the plaintiff stipulated that Anchor Hocking's due process challenges (including, but not limited to, "procedural" due process or the "rational juror" standard) were preserved for review.[3] Anchor Hocking's

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3. The Respondent's trial counsel (her counsel of record in this Court) affirmed at trial that "[w]e have stipulated [that the following] affirmative defenses are preserved, as legal defenses":

> The imposition of punitive damages against the defendant would violate its constitutional rights under the due process clauses in the Fifth and Fourteenth Amendments to the Constitution of the United States and the excessive fine clause in the Eighth Amendment to the Constitution of the United States and the provisions of the Oregon Constitution. That's the fourth affirmative defense.
>
> The fifth affirmative defense is plaintiff's claim for punitive damages [is improper], to the extent it seeks an award in excess of a rational, what a rational juror would

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post-trial motion challenged the punitive award as exceeding the substantive constitutional limit, anticipating the standards of *BMW* and expressly preserving the right to invoke any further articulation of the due process standards. CR 42 at 13-16. Anchor Hocking continued to press all of the constitutional theories it asserts in this Court — the primacy and applicability of the *BMW* guideposts, improper extraterritorial punishment, and excessive fines — at every stage of the appellate process.[4]

Nor is there merit to the plaintiff's contention that Anchor Hocking failed to invoke *Parrott v. Carr Chevrolet, Inc.*, 331 Or. 537, 17 P.3d 473 (2001), and *Cooper*. Opp. at 5. *Parrott* (holding that the "rational juror" standard is the appropriate standard in Oregon even after *BMW*) was issued while Anchor Hocking's petition for reconsideration was pending before the Oregon Supreme Court. *Cooper* was issued after *Parrott*, and after the Oregon Supreme Court granted reconsideration in this case, remanding precisely so that an Oregon reviewing court

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> be entitled to award, taking into consideration the facts and circumstances of this action.

Tr. 558.

4. *See* Opening brief in the Court of Appeals (07/18/96) at 2, 27-39; Reply brief in the Court of Appeals (02/05/97) at 6-10; Response to the plaintiff's petition for review in the Oregon Supreme Court (02/09/98) at 25-28 (urging that if the court granted review of the Court of Appeals' August 1997 decision reversing and remanding for a new trial on state-law grounds, it should also consider the punitive damages issues); Merits brief in the Oregon Supreme Court (07/13/99) at 45-49; Petition for reconsideration in the Oregon Supreme Court (08/09/00) at 1-2, 12-17 (noting that the July 2000 decision reversing the Court of Appeals' August 1997 opinion and ordering that judgment be entered for the plaintiff was improper because no Oregon reviewing court had considered Anchor Hocking's assignments of error concerning punitive damages); Request for supplemental briefing on remand to the Court of Appeals to address, *inter alia*, this Court's recently-issued decision in *Cooper* (06/05/01); Petition for review to the Oregon Supreme Court (10/10/01) at 1-8, 22-28.

could consider — for the first time — the punitive damages issues. Indeed, Anchor Hocking sought leave to brief *Cooper* on remand, but the Oregon Court of Appeals refused.

Finally, Anchor Hocking properly preserved its contention that the $1 million punitive award includes impermissible extraterritorial punishment. Anchor Hocking repeatedly sought to limit the improper use of evidence of prior complaints (including the case from Tennessee that it won) during trial. These complaints were admitted only for "notice" that Anchor Hocking had been sued, but the plaintiff nonetheless improperly argued their supposed merit. *See, e.g.*, Tr. 473, 618-19, 622, 631, 653-54. Anchor Hocking consistently objected on extraterritoriality grounds to the use of its net worth and nationwide profits on all products as benchmarks for imposing punitive damages.[5]

II. Oregon's "Rational Juror" Standard Conflicts with *Cooper* and *BMW*.

The Respondent defends Oregon's "rational juror" standard by tracing its lineage to this Court's decision in *Jackson*, 443 U.S. at 324 (1979). Opp. at 9. Any reliance on *Jackson* (providing for sufficiency-of-the-evidence review of historical facts found by the jury) is misplaced because the analysis of excessiveness under the Due Process Clause does not involve review of a jury's factual findings.[6] As the Court stated in

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5. Indeed, Anchor Hocking's preservation of the constitutional issues (acknowledged by the Oregon Court of Appeals) sets this case apart from *Key* (where the same court found no preservation). This case, like *Key*, should at least be held pending disposition of *State Farm*.

6. It is typically impossible to determine what facts (if any) the jury found in setting an amount of punitive damages or the relative weight it gave to any facts it may have found. A rule requiring deference to phantom findings is unworkable because it necessarily rests on speculation about the jury's reasons. *See DeKalb* Petition at i, 11-13

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Cooper, "the jury's award of punitive damages does not constitute a finding of 'fact.'" 532 U.S. at 437. *BMW/Cooper* require a comparative legal analysis that examines factors outside the record in order to determine whether the defendant "receive[d] fair notice . . . of the severity of the penalty that a State may impose." *BMW*, 517 U.S. at 574. The *BMW* analysis assumes that a rational jury could have rendered the award consistently with the record and proper instructions. Indeed, if there were any question whether the award comported with the record and instructions or otherwise complied with state law, a court would properly address those issues first, avoiding any constitutional issue. Oregon's "rational juror" standard is unconstitutional because it prohibits what *BMW/Cooper* mandate — an evaluation of factors and evidence that were never before the jury under legal standards the jury was never told about and for which courts, not juries, have expertise.

This Court has itself applied *BMW/Cooper* without deferring to the jury and without limiting itself to the evidence presented at trial. For example, in determining the degree of reprehensibility of the defendant's conduct in *BMW*, this Court did not confine itself to evidence of record, but examined case law and statutes relevant to the gravity of the applicable conduct. *See* 517 U.S. at 565-76. The Court created a spectrum of reprehensibility by using other cases and then evaluated the defendant's reprehensibility according to its location on this spectrum. This comparison obviously goes beyond review of the rationality of a jury finding. Similarly, proportionality review involves application of a legal standard meant to gauge the reasonableness of the award (*see id.* at 580-82), not an examination of the record to find support for the jury's verdict. Finally, the comparison of the punitive damages award to

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(seeking review of the Federal Circuit's requirement that courts base their reprehensibility analysis on facts the jury may have found; the Federal Circuit acknowledged that the analysis it mandated rendered reprehensibility review under *BMW/Cooper* "essentially meaningless").

legislative sanctions for comparable conduct is a legal inquiry that no jury undertakes. *See id.* at 583-84. Indeed, this guidepost is "more suited" to appellate review because it calls for "a broad legal comparison." *Cooper*, 532 U.S. at 440.

Notwithstanding *Cooper*, the "rational juror" standard requires deference to the amount a jury awards by treating it like an historical fact. By design, this standard provides no tools for gauging whether the amount awarded was proper. Whether the award satisfies the "rational juror" standard depends "on the statutory and common law factors that allow an award of punitive damages for the specific kind of claim at issue." *Parrott*, 331 Or. at 538, 17 P.3d at 481 (internal citation and quotation omitted). ORS 30.925 supplies seven factors for determining whether any award of punitive damages in a product liability action is appropriate. None of the factors addresses the amount a jury should award, leaving this calculus to the jury's discretion. Such reflexive deference to the jury is no different from the highly deferential review struck down in *Oberg* (*federal*).

Without acknowledging the conflict between the "rational juror" standard and *BMW/Cooper*, the Respondent resorts to analytical sleight of hand. She contends that Anchor Hocking received adequate review below because the Oregon Court of Appeals reviewed de novo *the trial court's* decision not to reduce the $1 million punitive award. Opp. at 13-22. It is impossible to know what the trial court did in this case with respect to the Due Process analysis, for it denied Anchor Hocking's post-trial motions without explanation.[7] *See* 19a-21a. More importantly, the de novo review mandated in *BMW/Cooper* would be eviscerated if in Oregon all it meant was secondary review by the appellate court of the trial court's finding that the jury acted rationally based on the evidence presented. *BMW/Cooper* require

7. Both *BMW* and *Cooper* were issued after the trial court considered Anchor Hocking's post-trial motion. The trial judge in this case also presided in *Oberg*, where on remand the Oregon Supreme Court both announced and applied the "rational juror" standard and refused to reduce the punitive damage award.

that all Oregon courts, at every level, engage in the same exercise: review of the jury's award de novo, taking into account facts and policies that go well beyond those the jury did consider, or could properly have considered. Compelling the trial court to defer to the jury's findings, as Oregon does, and then relegating the state appellate courts to a second-order "de novo" review of the trial court's deferential review of the jury's decision, as Oregon does, falls greviously short of the constitutional minimum established by this Court.

The Oregon Court of Appeals did not in fact conduct a de novo review of the jury's award under *BMW/Cooper*. After refusing to take additional briefs about the new *Cooper* decision, the Oregon Court of Appeals mistakenly treated *Cooper* as dealing only with the standard of appellate review, ignoring *Cooper*'s statements that *BMW* settled the substantive due process standard and that the amount of punitive damages is not a fact entitled to deference. *Waddill*, 175 Or. App. at 302 n.5, 27 P.3d at 1097 n.5 (2001) (11a). Its application of *BMW* was worse. To be sure, the Court of Appeals recited the constitutional principles set forth in *BMW*. "[I]ts application of them," however, was "nothing short of baffling." *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 510 (2001) (per curiam) (summarily reversing lower court opinion for its facially accurate recitation but erroneous application of this Court's precedents). For example, after acknowledging that *BMW* required a review of "the civil and criminal sanctions provided for comparable misconduct," *Waddill*, 175 Or. App. at 305, 27 P.3d at 1098 (internal citation and quotation omitted) (16a), the Oregon Court of Appeals conducted no review at all. Instead, it said "there is no evidence of any other punishment *imposed on defendant* for these actions." *Id.* at 306, 27 P.3d at 1099 (16a) (emphasis added).[8]

8. Application of the proper standard in this case would not be an empty exercise. The Court of Appeals in *Parrott* applied *BMW* and reduced a $1 million punitive damages award to $300,000. In *Waddill*, (Cont'd)

History shows that the disparity between the *BMW/Cooper* standard and the Oregon standard is outcome determinative, for there apparently is no punitive award that can fail to satisfy the "de novo" review of the Oregon Supreme Court. As a summary provided in *Key* shows (*see Key* Appendix, 118a), in the 15 post-*BMW* decisions (in addition to *Key*) in which punitive damages have been challenged, the Oregon Court of Appeals has allowed a remittitur only twice (in *Parrott* and *Jensen*).[9] The Oregon Supreme Court has never permitted a remittitur of a punitive award. It reversed the Court of Appeals' decision to remit in *Parrott*. 331 Or. at 565, 17 P.3d at 490.[10] *Jensen* is on review.

III. The Excessive Fines Clause Issue Merits Review.

The Respondent disputes whether the Excessive Fines Clause should apply (Opp. at 22-23), but not that there is a stark, unresolved conflict on this issue. *See* Petition at 23-24.

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the court acknowledged that the defendant in *Parrott* acted more reprehensibly than Anchor Hocking did. 175 Or. App. at 306 n.8, 27 P.3d at 1099 n.8 (17a).

9. *See Parrott v. Carr Chevrolet*, 156 Or. App. 257, 274-75, 282, 965 P.2d 440, 451, 455 (1998) (remittitur of $1 million punitive award to $300,000), *rev'd in relevant part*, 331 Or. 537, 565, 17 P.3d 473, 490 (2001); *Jensen v. Medley*, 170 Or. App. 42, 57-60, 11 P.3d 678, 688-89 (2000) (remittitur of $1.25 million punitive award to $175,000), *review allowed*, 334 Or. 411, 52 P.3d 436 (2002). The remittiturs in *Parrott* and *Jensen* were both based on *BMW*.

10. The Respondent ironically touts this reversal as proof that the Oregon courts review trial court decisions de novo. Opp. at 13-14. The Oregon Supreme Court's reversal, however, was not based on disagreement with the lower courts' application of an agreed legal standard. The lower courts applied *BMW*, and indeed, the Oregon Court of Appeals held that *BMW* superseded the "rational juror" standard. The Oregon Supreme Court reversed in *Parrott* because it rejected *BMW* in favor of the "rational juror" standard.

IV. *State Farm* Presents Sufficiently Similar Issues to Justify Holding This Case.

The Respondent opposes a hold pending this Court's disposition of *State Farm v. Campbell*, No. 01-1289 (set for argument December 11, 2002), contending that *State Farm* concerns only extraterritorial punishment and that Anchor Hocking has insufficiently preserved this issue. As discussed above, *State Farm* is not so limited. Even if it were, however, Anchor Hocking has properly raised the extraterritorial punishment issue. Anchor Hocking not only pointed to the extraterritorial nature of the Tennessee complaint, improperly used by the plaintiff to show its supposed conscious disregard for safety, it also challenged the plaintiff's use of Anchor Hocking's nationwide profits as a benchmark for punitive damages. Indeed, the plaintiff improperly urged the jury to surmise the existence of other complaints throughout the country, and to punish Anchor Hocking precisely because neither Anchor Hocking nor the plaintiff had evidence that any such complaints even existed.[11] Anchor Hocking consistently raised the extraterritorial punishment issue below, but no Oregon reviewing court ever considered it.

CONCLUSION

For the reasons stated here and in the Petition, as well as for the reasons stated in the American Insurance Association and Associated Oregon Industries amicus briefs in *Key*, this Court should review the judgment of the Oregon Court of Appeals. Alternatively, the Petition should be held pending disposition of *State Farm v. Campbell*, No. 01-1289.

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11. *See, e.g.*, Tr. 632 ("Are there really only three other complaints? Do they really only have those three?"); Tr. 617.

Respectfully submitted,

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